IN THE

Supreme Court of the United States

SEP 24 1949
CHARLES ELMORE CROPLEY
CLERK

October Term, 1949

No. 353

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

JOSEPH L. LEWINSON,
1120 Pacific Finance Building, Los Angeles 14,
RICHARD C. GOODSPEED,
415 Black Building, Los Angeles 13,
Attorneys for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Petition for Writ of Certiorari to the Supreme Court of the State of California 1

Jurisdiction 4

Summary statement of matters involved 4

Questions presented 31

The reasons relied upon for the issuance of the writ 35

Brief for Petitioner in Support of Petition for Writ of Certiorari 39

The opinions of the courts below 40

Jurisdiction 40

Statement 42

Constitutional and statutory provisions 48

Specifications of error 51

Summary of argument 54

Argument 57

Point I. The judgment of the Supreme Court of California deprived petitioner of due process in affirming the judgment of the Superior Court, because the judgment of the Superior Court rested alone on a report of a state agency appointed as referee in its quasi-corporate character, and a stipulation of the parties, other than petitioner, and neither the report nor the stipulation accorded petitioner the full, open, and fair hearing required by due process, nor did the hearing before the Superior Court meet such requirements 57

PAGE

Point II. The petitioner was deprived of due process by the judgment of the Supreme Court of California holding that the other parties to the action had collectively become entitled to plaintiff's water by prescription merely because there was an overdraft in the area or a lowering of the water table; said decision is arbitrary and impossible of rational application; under pre-existing law prescriptive rights could be gained by the other parties only severally, and not collectively, and only by the actual taking of petitioner's water adversely for a period of five years, with notice to petitioner of such adverse taking; and under pre-existing law petitioner had no notice of adverse user by the other parties to the action and no cause of action against the other parties merely by reason of an overdraft or the lowering of the water table.... 70

Conclusion 86

TABLE OF AUTHORITIES CITED

CASES	PAGE
Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185	82
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673	41, 72, 73, 86
Carter v. Kubler, 320 U. S. 243	41, 57, 63
City of San Diego v. Cuyamaca Water Co., 209 Cal. 105	84
Dunbar v. New York, 251 U. S. 516	72
Everts v. Matteson, 68 Cal. App. 2d 577	65
Fewel v. Fewel, 23 Cal. 2d 431	64
Hillman v. Hardwick, 3 Idaho 255, 28 Pac. 438	35
Hurd v. Hodge, 162 F. 2d 233; reversed 334 U. S. 24	71
Lakeside Ditch Co. v. Crane, 80 Cal. 181	82
Morgan v. United States, 298 U. S. 468	41, 57, 59, 64, 86
Morgan v. United States, 304 U. S. 1	41
Muhlken v. New York & Harlem Railroad Co., 197 U. S. 544	72
Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292	41, 57, 60, 86
Pabst v. Finmand, 190 Cal. 124	83
Pacific Live Stock Company v. Lewis, 241 U. S. 440	66
Peabody v. City of Vallejo, 2 Cal. 2d 351	66, 74
Peterson v. Colorado ex rel., 205 U. S. 454	72
Powhattan Mining Co. v. Ickes, 118 F. 2d 105	63
Shelley v. Kraemer, 334 U. S. 1	41, 70, 72, 73
Stevinson v. San Joaquin etc. Co., 162 Cal. 141	82
United States v. Dillman, 146 F. 2d 572; cert. den. 325 U. S. 870	63
Warring v. Colpoys, 122 F. 2d 642; cert. den. 314 U. S. 678	72
Western Union Telegraph Co. v. Industrial Commission, 24 Fed. Supp. 370	63

STATUTES **PAGE**

California Civil Code, Sec. 1007..... 49
California Civil Code, Sec. 1414..... 49
California Constitution, Art. XIV, Sec. 3.....48, 81
California Statutes of 1913, Chap. 586, p. 1012.....8, 49, 51
California Water Commission Act, Sec. 24.....8, 49, 51
Deering's General Laws of California (1937), Act 9091..... 8
Rules of the United States Supreme Court, Rule 38..... 4
United States Code, Title 28, Sec. 1257, Subd. 3.....4, 41
United States Constitution, Fourteenth Amendment.....
.....35, 40, 52, 53

TEXTBOOKS

98 American Law Reports (1935), p. 1109, anno..... 65
38 Michigan Law Review (1939), p. 30, Stimson, Retroactive Application of Law..... 72
18 North Carolina Law Review (1940), p. 199, Spruill, The Effect of an Overruling Decision..... 72

IN THE

Supreme Court of the United States

October Term, 1949

No. .....

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

May It Please the Court:

The petitioner, California-Michigan Land and Water Company, a corporation, prays that a Writ of Certiorari issue to the Supreme Court of the State of California to review a judgment of that Court in case numbered L. A. No. 19610 in the files of said Court, rendered on June 3, 1949, the petition for rehearing of which was denied on June 27, 1949. The judgment of the Supreme Court of California reversed the judgment of the District Court of Appeal of the State of California, in and for the Second Appellate District, rendered on May 6, 1947, which, in turn, reversed a part of the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, entered by that Court on December 26, 1944. The judgment of the Supreme Court of California affirmed in its entirety the judgment of the Superior Court except in minor particulars not material here. The judgment of the District Court of Appeal was concurred in by all three Justices of that Court. Carter, J., dissented from the judgment of the Supreme Court of California. Schauer, J., did not participate in the judgment of that Court. Carter and Schauer, J. J., voted for a rehearing. The judgment of the Superior Court fixed and determined the annual water production rights of petitioner, appellant in the District Court of Appeal and the Supreme Court of California, in the waters of the Raymond Basin area, at the time of the filing of the suit by City of Pasadena in 1937, at 521 acre feet annually, and then enjoined it from taking in excess of 359 acre feet annually, thus transfer-

ring from petitioner to City of Pasadena and other respondents the right to take 162 acre feet annually.

Petitioner also prays that the Writ of Certiorari to the Supreme Court of the State of California include a review of a judgment of that Court in cause numbered L. A. No. 19186 in the files of said Court, also rendered on June 3, 1949, the petition for rehearing of which was denied on June 27, 1949, affirming the judgment of the District Court of Appeal entered May 6, 1947, which, in turn, affirmed two intermediate orders entered by the Superior Court of the State of California, in and for the County of Los Angeles (in the same case reviewed by the Supreme Court of California numbered L. A. No. 19610 in the files of said Court) on June 2, 1942, and on November 24, 1943, respectively, the latter incorporating the former, requiring petitioner to pay a portion of the expenses incurred by the Division of Water Resources of the Department of Public Works in acting as Referee in said cause, pursuant to a prior order of reference made by the Superior Court.

The District Court of Appeal considered petitioner's appeals from the two intermediate orders and the appeal from the final judgment of the Superior Court as "so closely related and intermingled as to justify, in the interest of clarity, their consideration * * * as in effect one appeal." [Record, Opinion District Court of Appeal, 79 A. C. A. 562, p. 570.] Petitioner's appeals from the two orders and the judgment in the cause were treated in like manner by the Supreme Court of California. [Record, Opinion Supreme Court of California, 33 A. C. p. 937.]

Jurisdiction.

This Court has jurisdiction under Title 28 of United States Code, Section 1257, subdivision 3.

A certified transcript of the records in the case, including the proceedings in the Supreme Court of the State of California and the decisions of that Court and the dissent thereto, are furnished herewith in compliance with Rule 38 of the Rules of this Court.

Summary Statement of Matters Involved.

1. On September 23, 1937, City of Pasadena brought an action in the Superior Court of the State of California, in and for the County of Los Angeles, to quiet its title to the rights to water in the Raymond Basin Area to the amount of 14,600 acre feet annually, which it claimed as prior appropriator, based upon plaintiff's alleged ownership of, or water rights claimed by plaintiff in, 24 separately described parcels of water-bearing land within said area.

Twenty-five persons and corporations, including petitioner, a public utility, were named as defendants. Three additional parties were later brought in as defendants. The twenty-nine parties to the action, including plaintiff, included six municipal corporations, a county water district, certain public utilities other than petitioner, mutual water companies, golf clubs, cemeteries, and owners of ranches. Twenty-six defendants filed answers. The remaining defendants filed disclaimers. In its complaint City of Pasadena did not claim a prescriptive right to water, and did not recognize any equality of right of any other person but, as above stated, the City of Pasadena claimed as a prior appropriator. City of Pasadena also alleged in its complaint that the total annual draft upon

the water in the underground basin by itself and defendants greatly exceeded the annual supply of water thereto; that the water in said basin since the year 1916 had been depleted in increasing amounts; that the water level in the basin by reason of overdraft had lowered in elevation since the year 1916 to the time of suit as much as 150 feet in some places; that in the event the overdraft continued in the future, the basin ultimately would be depleted to such an extent that it would be impracticable for plaintiff to obtain water therefrom in accordance with its rights. Petitioner in its answer, generally speaking, denied the allegations of the complaint as to the alleged prior and paramount rights of plaintiff; alleged that it had the sole and exclusive right, prior and paramount to any right of plaintiff, to divert the water from a portion of the southeastern part of Raymond Basin Area, 'known as the Eaton Creek watershed,' to a total amount of 700 acre feet annually, three-fourths of which it was entitled to take for the use and the service of its customers located on lands outside the Raymond Basin Area and one-fourth of which it was entitled to take for the use and service of its customers located on lands overlying portions of the area. Petitioner also alleged that the overdraft in said Basin was due to the fact that plaintiff had been, and still was, wrongfully taking water from various surface streams that naturally drained into the area to such extent as to cause any overdraft or shortage there might be, and hence plaintiff was estopped to complain of the alleged overdraft. The answers of the other defendants were several, and denied plaintiff's alleged prior and paramount rights. The answers of the respective defendants did not present claims against the other defendants. Petitioner filed no cross-complaint against plaintiff or any defendant, but served its answer only on plaintiff. It was not served with the answers of

the defendants, or any of them, or with the cross-complaints served by several of the defendants on plaintiff. [Rec., Clk. Tr., pp. 1, 698 *et seq.* Op. Dist. Ct. of App., 79 A. C. A. 582, 584.[1]]

2. Before answering, petitioner demurred to the complaint, both generally and specially, and also filed a motion for a bill of particulars in order to obtain a statement of the details of the plaintiff's claim, or claims, based upon each, any, and all of the aforesaid properties, or otherwise. The demurrer was overruled, and the motion for a bill of particulars was denied. (33 A. C. 931.)

3. The Raymond Basin valley area comprises about forty square miles of alluvial-filled valleys containing subterranean obstructions of such nature as to create a basin of underground water fed from the natural precipitation thereon and from surface and underflow from about fifty-two square miles of tributary hill and mountain areas. This is within the semi-arid valleys of the Los Angeles and San Gabriel Rivers and is located a few miles northeast of the City of Los Angeles. [Rec., Ref. Rep., Ex. 1, pp. 3, 4, 273.]

The valley area is highly urbanized, and within it are the City of Sierra Madre, virtually all of the City of Pasadena, and a portion of the cities of South Pasadena, San Marino, and Arcadia. Bordering the area to the

---

[1]"Petition of Respondents for Hearing by the Supreme Court" of California, the respondent petitioners being respondents here, states that the facts are correctly stated in the opinion of the District Court of Appeal except as otherwise mentioned. The exceptions mentioned in the petition are immaterial here. (p. 3.)

The opinion of the District Court of Appeal as reported in 79 A. C. A. 562-616 is included in the Record. The opinions of the Supreme Court of California as reported in 33 A. C. 891-938, are also included in the Record.

south are the cities of Alhambra and San Gabriel. Much of the remainder of the valley area is urban in character although not incorporated into municipalities. The area is definitely delimited from the remainder of the valley by the Raymond Fault. There is a natural fault in the bedrock which impedes the passage of water, the latter being somewhat over 1,000 feet lower in the south central area than the water table level in the northerly and northwesterly sections of the area. [Ex. 1, p. 73, Plate 13.] The fault runs slightly north of east across the valley floor and is evidenced on the surface by a sudden rise in the ground along part of its course and beneath by a water table which is two hundred to three hundred feet lower on the southern side of the fault than on the northern side. The underground water of the Raymond Basin Area is divided into two practically separate units, that of Pasadena sub-area and Monk Hill Basin, together comprising a single unit, designated as Western Unit, and that of Santa Anita sub-area being called the Eastern Unit. The wells of petitioner are located in the southeastern part of the Western Unit, known as Eaton Wash watershed. At the present water table elevations, movement of ground water from the Western to the Eastern Unit is so small as to be immaterial, and movement from the Eastern to the Western Unit is almost totally lacking. In the Western Unit the principal movement is from north and west of Monk Hill to the south and east and across Raymond Fault. The water in this Unit is replenished by rainfall, by return of water arising from the use of water in the Unit, and by the runoff and underflow from the San Gabriel Mountains to the north and from the San Rafael hills to the west. [Rec., Op. Dist. Ct. of App., 79 A. C. A. 570.]

4. On February 8, 1939, the Superior Court, over the objections of petitioner, under then Section 24 of the Water Commission Act (Stat. 1913, Ch. 586, p. 1012, as amended; Deering's Gen. Laws, 1937, Act 9091), made an order appointing the Division of Water Resources of the Department of Public Works of the State of California, as the statutory successor of the Water Commission, as Referee in the pending cause. (See Brief, "Constitutional and Statutory Provisions.")

5. The Order of Reference made by the Superior Court purported to appoint the Division of Water Resources as Referee to investigate all of the physical facts in said action, and seasonably to report to the court thereon, but, in truth and fact, it referred all of the issues in the case to the Division of Water Resources. This appears from the Order of Reference, which, omitting formal parts and recitals which are immaterial, is as follows:

> "NOW THEREFORE IT IS HEREBY ORDERED that the Division of Water Resources, Department of Public Works, State of California, be and is hereby appointed referee in the above entitled action to investigate all of the physical facts involved in said action, and seasonably to report to the court thereon.
>
> This order is made pursuant to Section 24 of the 'Water Commission Act' of the State of California, Statutes of 1913, Chapter 586, as amended by Statutes of 1931, Chapter 1135.
>
> Said report shall include the following, but not to the exclusion of findings as to other physical facts involved in said action:
>
> I.
>
> "All factual data having material bearing upon the origin, the quantity and availability, and the use of

water within the area involved in the issues of the action, and any subdivision which may be found to exist therein, including:

(a) Development of ground water by means of wells, tunnels, or other facilities.

(b) Diversion of surface water from streams contributing to the ground water supply.

(c) Chemical character of the water contributing to and extracted from the ground water.

(d) Use of water within said area and exportations therefrom.

II.

"A complete report on the geology of the region, in so far as it has material bearing upon the character and extent of the alluvium in the area involved in the issues of the action and upon the replenishment, storage, movements, and extractions of ground water therefrom, including the effective capacity of each basin or other subdivision, if any, which is more or less distinct from surrounding or adjoining parts by reason of the physiography, hydrological phenomena, or cultural features.

III.

"The correlation of all of the factual data set forth in Part I, when interpreted in the light of the geologic report comprising Part II, including:

(a) The nature, amount, and time of occurrence of all natural and artificial contributions to the ground water underlying the area involved in the issues of this action, and each subdivision, if any, thereof.

(b) The nature, amount, and time of occurrence of all natural and artificial outflow and withdrawals

from the ground water underlying the said area and each subdivision, if any, thereof.

(c) Importations and exportations of water to and from said area and each subdivision, if any, thereof.

IV.

"Conclusions, where clearly evidenced, as to the following:

(a) The safe yield of each basin or sub-basin, if any, within the area involved in the issues of this action; that is, the supply which may continuously be withdrawn from the ground water and streams contributing thereto without permanent and progressive lowering of the water table.

(b) The surplus water available which has existed or does exist, if any, in said area, and each subdivision, if any, thereof.

(c) The overdraft which has been made or is being made, if any, upon the supply of water in said area, and each basin or sub-basin, if any, thereof.

It is recommended to the parties to this action, that they, severally and jointly, appoint engineers to collaborate with the Division of Water Resources throughout this investigation, and it is recommended to the referee that it seek the advice and counsel of said engineers in the formulation of the program of investigation and in the preparation of the report." [Rec., Ex. 1, pp. XXI-XXIII.]

6. On June 9, 1939, over the objections of Petitioner, the Court made its order instructing the Division of Water Resources as Referee, among other things, "That the issues in the above-entitled cause embrace an adjudication of the rights of the defendants *inter se* and the rights of each and every party as against each and every other

party." The order did not require or direct any of the defendants to amend their pleadings to set up any claims against any of the other defendants, and no such claims were set up by any pleading or other instrument. The order instructing the Referee, so far as material here, omitting formal parts and recitals, is as follows:

> "* * * and the court now being fully advised in the premises hereby finds, orders and instructs its said Referee the Division of Water Resources as follows:
>
> 1. That the issues in the above-entitled cause embrace an adjudication of the rights of the defendants *inter se* and the rights of each and every party as against each and every other party.
>
> 2. That the matters specified for investigation and report upon by the referee in paragraphs I to IV inclusive of said order of reference are hereby declared by the court to be within the issues of said action or are involved in said action and are pertinent thereto and necessary for investigation and report upon by the referee; that no objections, other than the aforementioned objection filed by the California-Michigan Land & Water Co. to the jurisdiction of the court to hear said application, were made to the investigation and report by the referee upon said matters; and said order of reference is hereby confirmed and ratified by the court in its entirety and said referee is instructed to continue to proceed thereunder and investigate and report to this court upon all matters contained therein and as therein ordered." [Rec., Ex. 1, pp. XXIV-XXV.]

7. On July 12, 1943, the Division of Water Resources filed its report as Referee, and petitioner filed objections to said report, which objections were later overruled. The

report consists of one printed volume, designated "Report of Referee," comprising 392 printed pages [Ex. 1], and another printed volume, designated "Basic Data Submitted as Exhibit to Report of Referee," comprising 555 printed pages. [Ex. 2.]

The Report of the Referee contains numerous maps, graphs, documents, and tables, and, among other things, covers the history of the development of water and use by municipalities, companies, and individuals named, in connection with the geology of the area involved, and particularly that of the Raymond Basin Area, including the structural features and conditions pertaining to ground water movement; the subject of hydrology covering past, present, and future of water flow into and out of the area, sewage, consumptive use of water, storage of water underground, duty of water, and the changes in water table elevations over long periods; safe yield and overdraft by water users, deep percolation, quality of water, and pumping tests to determine extent of influence on water tables. These are followed by an extensive summary, findings, and conclusions. In addition to general matters, the report includes matters directly relevant to the issues of the case. The Referee's Report contains a "History of Water Development and Use by Municipalities, Companies, and individuals named in suit" (and by their supposed predecessors in interest) [Ex. 1, p. 9], showing the manner in which the various operators acquired their wells, the date of acquisition, and the use to which the water had been placed. In most instances the report gives the time when the diversion, or production, of water was made from tributary mountain sources [Ex. 2, pp. 433-441], the number of wells producing [Ex. 1, pp. 9-31], and the beneficial use to which the water was applied. [For example, see Ex. 1, pp. 16-21.]

In Table L of Exhibit 2, pages 445/L to 494/L is contained the "Record of Measured Well Production," giving the amount in acre feet produced by the wells of the various litigants and of their supposed predecessors in interest from year to year. The measurements and other data purport to be obtained from the records of the parties.

In Table M of Exhibit B, pages 495/M to 533/M is given an "Estimated Well Production," containing the production of wells of certain litigants and of their supposed predecessors in interest where records had not been kept, based on various estimates and calculations. An example of this is seen in page 495/M, where we find the entry: "Method of estimating production: Kilowatt hours and plant equipment to April, 1926; then by comparison with season 1924-25 as gasoline engine was installed."

In both tables certain thumb rules are applied to determine whether the use of a well has been stopped or whether it has been abandoned. Thus the "use is considered stopped when pumping equipment has been removed or disconnected," the "well is considered abandoned when it is no longer possible to install pumping equipment." [See Ex. 2, pp. 445/L, 495/M.] Nothing is said about whether an owner, having disconnected his pump, may intend to connect up and resume operations or whether he intends to cease operations.

The findings in the Referee's Report are 35 in number. [Report, pp. 185-189.]

Finding 14 is as follows:

> "Safe yield of the Western Unit considered by itself is 18,000 acre feet. Annual pumping draft is 24,000 acre feet. Annual overdraft with present importations for use is 6000 acre feet."

The report shows the annual use of water by each of the parties to the action and that such use aggregated 24,000 acre feet pumped less approximately 300 acre feet used by persons not parties to the action, plus 3700 acre feet diverted from local surface streams.

The finding as to safe yield is based on highly controversial facts such as under flow from mountains and hills, the duty of water, the beneficial uses to which the land is put, and the location of the Raymond Fault [see Ex. 1, pp. 89, 83, 43]; and the evidence as to "the existence and the amount of the overdraft" was conflicting. (Op. Dist. Ct. of App., 79 A. C. A. 571.)

The determination of the amount of water produced is in some cases based on estimates made from power bills which are equivocal. [See Rep. Trial Tr. pp. 55-57, 141-145.]

8. The Referee's Report was based on data in the files of the Division of Water Resources, and private investigations extending over a period of at least three years, and perhaps four and one-half years, without holding any hearing or hearings, or calling or swearing any witnesses. [Rep. Trial Tr. pp. 138, 146.] The report is the work of many hands, but the report itself does not indicate who did the particular work. The field notes on which the report is based, in part, are not attached to or filed with the report. [Rep. Trial Tr. pp. 53-65; Ex. 1.] George B. Gleason, under whose supervision the field work, or most of the field work, was done, did not know whether there was any work done intermediate between the field work and the completed reports, and if such intermediate work was done, he testified it had not been preserved. [Rep. Trial Tr. p. 127.] The report particularly acknowledges indebtedness to "the Engineers of the Water Department of the City of Pasadena, who have been for

many years gathering data of various kinds which were made available." [Ex. 1, p. XIX.] The report also acknowledges that the Water Department of Pasadena furnished valuable data, which is listed. [*Id.*] The report also states "All analyses under the direction of the referee showing amounts of solids in the waters of Raymond Basin Area since the inception of this investigation have been made in the laboratory of the Los Angeles Bureau of Water Works and Supply under the supervision of Mr. R. F. Goudey, Sanitary Engineer of the Bureau." [*Id.*] The report continues: "Others were made by University of California Citrus Experiment Station at Riverside and by the City of Pasadena." [*Id.*] The report thanks certain scientists of the Citrus Experiment Station of the University of California, and states: "and other members of the staff of the Station have given valuable aid to the investigation in interpreting the meaning of all analyses of quality of water." [*Id.*] The report then lists seventeen municipal and private corporations, United States Geological Survey, and United States Weather Bureau, and alludes to other "individuals and companies too numerous to mention" as having been specially helpful. [*Id.*] The report is signed "Division of Water Resources, Department of Public Works, State of California, Referee, by Edward Hyatt, State Engineer and Chief of the Division of Water Resources," but there is nothing to indicate that Mr. Hyatt had any part in the investigation or making of the report, and the only inference that can be fairly drawn from the testimony is that his sole contribution was his signature. [Ex. 1, p. 189.]

The report shows Joseph T. Maguire, the Staff Member designated as Senior Delineator, was deceased at the time the report was made. At the time of the trial, H.

O. Banks, Staff Member designated as Assistant Hydraulic Engineer, was in the South Pacific. [Ex. 1, p. XXXI.] Staff Member W. L. Berry, also Assistant Hydraulic Engineer, was in the Army. Staff Member E. C. Marliave, Assistant Engineer-Geologist, was no longer with the Division, and was in Berkeley, 500 miles away, and beyond the reach of subpoena. Melvin Marliave, who is not named as a Staff Member but who did work in the investigation, was in Panama. [Rep. Trial Tr. p. 63.] George B. Gleason, designated in the report as Senior Hydraulic Engineer in Charge of Investigation, testified:

> "[E. C. Marliave] *examined the geology and looked over the work that Melvin Marliave had done in the field, and interpreted it according to his lights as he saw it.* * * * That is all he did. He was just a geologist. That is his job. * * * [Melvin Marliave] was an assistant geologist on this job. The geology was assigned to him. He was the geologist and he made the geological studies." [Rep. Trial Tr. p. 62.]

When Mr. Marliave made his investigation and study, that was particularly in connection with this lawsuit. He made his study in the field and from prior studies and investigations, and reports of other geologists. As he made those studies, unquestionably he made maps, and there were one or two or three small reports. Those maps and the two or three small reports are in the Los Angeles office. He made a final report. The final report is in the report of the referee, Volume 1. It was made by him. Mr. Gleason did not believe there were any changes there that Marliave didn't make. That is the part of the referee's report under the heading of "Geology." [Rep. Trial Tr. pp. 129-130.]

Mr. Gleason further testified that he had charge of the investigation in Southern California under the "administrative direction" of Harold Conkling, Deputy State Engineer, who was located at Sacramento.

Mr. Gleason further testified in substance:

> I had charge of the work, as I say, under Mr. Conkling's administrative direction. I supervised locally that work, yes. I did a part of the work myself and part of it was done by others under me. I would say that my part of the work was outlining what we would do under the general outline as presented to me at the start of the job. In general, that was my work, working out the plan of what we would do, and making certain analyses. I assigned the doing of certain parts of the work to others, with the understanding, of course, that they were under my direction and that they would do it in a manner satisfactory to me and to the Division. [Rep. Trial Tr. pp. 52-53.]

Mr. Gleason was unable to state in detail or with particularity the work done by each of his subordinates. He was also unable to say whether he had written particular parts of the report. Likewise, he was unable to explain why the Raymond Fault was located in a different place on Plate 4 of the Report of the Referee than the locations assigned to it on a published map of Los Angeles Flood Control District or a map prepared by the Division of Water Resources in studies made in 1926 and 1928, respectively, except to say that the earlier geological studies were not as full as the studies made in the investigation which preceded the preparation of the Referee's Report. [Rep. Trial Tr. pp. 54, 93-104, 76-77, 83, 131.]

Mr. Gleason, having testified that the Referee's Report had been completed sometime in 1941, was interrogated

relative to the falling water tables in the lower portion of the Eaton Creek Zone of the southeastern and lower part of the basin where petitioner's wells were located. [Rep. Trial Tr. p. 74 *et seq.*]

Mr. Gleason testified in substance:

> Q. Well, you say in this report that the recession after 1904 in the Pasadena sub-area has been greatest in the lower Eaton Creek zone. Now, do you know what the average water table was—in that Eaton Creek zone in 1941? A. No sir I do not. It varied a great deal, of course, in that year, from one place to another.
>
> Q. And do you know what it was in the year 1942? A. Not in figures, no.
>
> Q. Do you know what it was in 1943? A. No, sir. The figure, and average for the lower Eaton Creek zone, does not appear in the report for either the years 1941, 1942 or 1943. I do not know what the average or mean of the water table of the lower Eaton Creek zone was in the year 1940, or 1939, or 1938, or 1937, or 1936, or any other time. It doesn't appear in the report anywhere. * * * When I say the lower half of the area, I mean the lower half of the Pasadena sub-area. [Rep. Trial Tr. pp. 74-76.]

Harold Conkling, Deputy State Engineer, testified that he took charge of the investigation at the Sacramento end for the Los Angeles office. He said: "After I had returned it to Mr. Gleason, I exercised supervision over the work in a general way. Not as to details." [Rep. Trial Tr. p. 134.]

Mr. Conkling also testified: "As to the report, I wrote the first and last chapters, and edited the other chapters to some extent." [Rep. Trial Tr. p. 134.]

Chapter 1 is entitled "Description and History of Development," and deals in part with "the rapid expansion and use of the underground water and the falling water table." [Ex. 1, p. 6.] The last chapter, namely, Chapter 5, is entitled "Summary, Conclusions and Findings." [Ex. 1, p. 166.]

9. Approximately four months after the filing of the Report of the Referee, that is to say on November 19, 1943, plaintiff, City of Pasadena, filed a notice of presentation of a stipulation between plaintiff and all of the defendants, other than LaCanada Irrigation District, and petitioner. The stipulation referred to in the notice of motion was filed November 24, 1943. It was dated September 29, 1943, and was signed by plaintiff, City of Pasadena, and all the nondisclaiming defendants, other than LaCanada Irrigation District, and petitioner. Attached to the stipulation were appendices "A" and "B." Appendix "B" is a proposed order. The case did not proceed to trial for six months, but the stipulated judgment is, in all substantial respects, the same as the final judgment entered by the Court more than a year after the date thereof. [Clk. Tr. pp. 1433-1510, 884 *et seq.*]

By the stipulation [Ex. 17], so far as material here, it was agreed:

> "That the Court is hereby authorized and requested to enter, as between the parties hereto, a judgment substantially in the form set forth in Appendix 'A' hereto attached and by this reference made a part hereof, and as to the other parties to the action, to wit: California-Michigan Land and Water Company and LaCanada Irrigation District, to hear, determine and adjudge their rights and make its determination a part of said judgment; that such parties are hereinafter, for convenience, referred to as 'non-consenting parties.'

That the rights of the parties hereto, as set forth in said judgment, are predicated upon the following factors, to wit:

(a) That the safe yield of the Eastern unit * * * is 3900 acre feet per year and the safe yield of the Western Unit * * * is 18,000 acre feet per year.

(b) That the present unadjusted rights of the parties are as set forth in paragraph IV of said judgment. (This included the rights of Petitioner although it was not a party to the stipulation.)

(c) That the amount of water pumped or otherwise taken from the ground in said Raymond Basin Area by non-parties to this action are as set forth in paragraph II hereof.

(d) The present unadjusted rights, if any, of the non-consenting parties in acre feet per year are as set forth after their respective names as follows:

California-Michigan Land and Water Company —521.

LaCanada Irrigation District—101.

(e) That the non-consenting parties should be restricted in the amount of water pumped or otherwise taken from the ground by each by reason of the existing overdraft in the Western Unit of the Raymond Basin Area in the same manner as provided in said judgment as to the parties hereto, and that such restriction should be determined by reducing the present unadjusted rights, if any, of each such non-consenting party in the proportion that the safe yield of said unit less the amount of water pumped or otherwise taken from the ground therein by non-parties to the action bears to the aggregate of such rights of the parties to the action in said unit, and that the rights of the non-

consenting parties, as set forth in sub-paragraph (d) hereof, so reduced in acre feet per year are as follows, to wit:

California-Michigan Land and Water Company —359.

La Canada Irrigation District—70

(f) That the rights of all the parties to this action are of equal priority and of the same legal force and effect

"That in order to conserve the waters of the Raymond Basin Area, the court make and enter an order making the provisions and obligations of the aforesaid judgment immediately effective as to the parties hereto at the time and in the manner set forth therein, and that such said order may be in the form set forth in Appendix 'E' hereto attached and by this reference made a part hereof."

As an extra consideration claimed by and allowed to the plaintiff, City of Pasadena, for its entering into said stipulation for judgment and as a part thereof, it was provided in paragraph II of said judgment, so far as material here, that said plaintiff in taking or diverting water for beneficial use from any source contributing to the supply of water in the ground in said Raymond Basin Area, "has the right to continue to divert from such source for such use an amount of water measured by the maximum capacity of its diversion works and other facilities as the same existed at any time within five (5) years prior to October 1, 1937. That said maximum capacities of the said works and facilities of each of such parties in cubic feet per second are as follows:

Pasadena, City of	
Arroyo Seco, including Millard Canyon	25.00
Eaton Canyon	8.90"

There was and is no pleading or proof whatsoever in the record as to any right of plaintiff to divert the said amounts of water, or any water whatsoever, from both or either of the said canyons, nor as to the capacity of plaintiff's diversion works therein.

On the same day the stipulation was filed, that is to say on November 24, 1943, an order was made by the Court which, omitting the recital of the names of the parties to the stipulation, is as follows:

> "It Is Hereby Ordered, Adjudged and Decreed that, during the pendency of this litigation, or until further order of this Court, each of the aforesaid parties shall observe and comply with each and all of the terms and provisions set forth in that certain proposed judgment, copy of which is attached hereto marked Exhibit 'A' and made a part hereof, and as to each of said parties each and all of the terms and provisions of said proposed judgment shall be and are hereby made immediately effective in the same manner and to the same extent as though each and all thereof were herein fully set forth at length." [Clk. Tr. pp. 1511-1512.]

The so-called "Raymond Basin Area Water Exchange Agreement of 1943," attached to and made a part of the stipulation and attached to and made a part of the judgment, recited that the parties to the agreement had entered into a stipulation dated September 29, 1943, consenting that judgment in the form made a part thereof be entered; said that for the purpose of settling the present litigation and making unnecessary further litigation, stabilizing the aggregate extraction of water in Raymond Basin Area and rendering water available to the parties to the agreement both under their respective decreed rights as set forth in the stipulated judgment and under the provisions of the

agreement for the release and exchange of water, the parties agreed as therein set forth. [Clk. Tr. pp. 1477 *et seq.*, 922 *et seq.*]

On March 7, 1944, plaintiff filed what it denominated an "Interpretative Statement," obviously as a concession to La Canada Irrigation District for its consent to the settlement and judgment. In this statement plaintiff asserted that it was its understanding that Raymond Basin Area, as described in the judgment of November 24, 1943, "does not include any part of the stream designated as Pickens Canyon or any part of any of its tributaries; or the surface or subterranean waters thereof; also, that no part of the surface of subterranean waters of said Pickens Canyon or any of its tributaries contributed to the supply of waters in the ground of said Raymond Basin Area."

This document was merely filed with the clerk; it was not served on anyone. It is contrary to the physical facts and to the Referee's Report. [Ex. 1, pp. 70-75, 243; Ex. 2, p. 88, Plate C, p. 89, Table C.] The detail of the wells shown as west of Pickens Canyon is given in Table C. The detail shows that the direction of groundwater flow is eastward from these wills through La Canada Valley. No doubt it was filed as an inducement to La Canada Irrigation District to join in the stipulation filed November 24, 1943, and the Raymond Basin Water Exchange Agreement of 1943, which followed almost immediately.

On April 28, 1944, a stipulation was filed between the parties to the stipulation of November 24, 1943, and in addition La Canada Irrigation District, by which La Canada Irrigation District became a party to the stipulation of November 24, 1943, and the "Raymond Basin Exchange Agreement of 1942," and for the amendment

of the Agreement accordingly, and of the judgment and order of November 24, 1943. [Clk. Tr. pp. 1717-1723.]

On April 28, 1944, an order was made on the said stipulation, to which is attached an "Amendment to Raymond Basin Water Exchange Agreement of 1943." By the stipulation La Canada Irrigation District became a party to the stipulation filed November 24, 1943, and became bound by the judgment of that date, and became a party to "Raymond Basin Area Water Exchange Agreement of 1943." It provided for appropriate changes in the Agreement. La Canada Irrigation District was included as one of the parties given the right to take water from any source contributing to the supply of water in the ground in Raymond Basin Area in an amount measured by the maximum capacity of its diversion works and other facilities as they existed at any time within five years prior to October 1, 1937, without there being at any time any pleading or proof with reference thereto. [Clk. Tr. p. 1724 *et seq.*]

10. The trial of the cause began on May 18, 1944. Petitioner objected to proceeding because it was "wholly unfeasible * * * to go to trial in a case of this character under war conditions, and those war conditions still continued." Petitioner also objected to litigating any controversy with any party except plaintiff, and stated that it had no controversy with any other defendant. Counsel for the Division of Water Resources as Referee stated: "The proceedings before the Court * * * are now on exceptions to [the] report. The report is predicated upon the Water Code, which holds that the report is *prima facie* evidence of the physical facts therein found." Counsel for the City of Pasadena also stated that "the report is *prima facie* evidence of the physical facts, but the Court shall hear such evidence as may be offered by any party, and

that burden is upon this defendant [petitioner] if he desires to do so." The Court then overruled petitioner's objections and exceptions to the report, except as to certain details not material here. [Rep. Trial Tr. pp. 5-9, 196-339.]

The Referee's Report was then offered in evidence, and over the objections of petitioner, including objections based on the Fourteenth Amendment of the Constitution of the United States, the report was received in evidence. [Rep. Trial Tr. pp. 18, 340.] Plaintiff offered no other evidence, except formal proof showing the acquisition of certain parcels during the pendency of the action, and then rested. (Op. Dist. Ct. App. 602.) Petitioner offered evidence which met, or tended to meet, the report. This evidence was received by the Court. Included in the evidence offered by petitioner was evidence showing, or tending to show, that the underground water in the Raymond Basin Area, particularly in the southeast portion thereof where petitioner's wells were located, was an underground stream and not merely an underground field of percolating water, as contended by plaintiff. (Op. Dist. Ct. App. 591.) Petitioner also requested the Court to permit it to show that plaintiff, City of Pasadena, was estopped from complaining of the alleged overdraft, because it had diverted surface water naturally contributing to the underground supply of the area, as alleged in petitioner's answer, but the Court refused to entertain such defense, or to adjudicate the issue. (Op. Dist. Ct. App. 604.)

It is entirely evident from the record that plaintiff and any and all of the defendants were at all times able to fully exercise by them and enjoy their legal rights to take the full amount of water claimed by them respectively, without any deprivation of any part thereof by any other

party, and particularly was this true as between plaintiff and petitioner. [Ex. 1, p. 30 ff; also, Op. Dist. Ct. App. 595.]

The record discloses that in 1911 petitioner purchased 171 acres immediately north of Raymond Fault. Petitioner retains only a few parcels (about 10%) of the original 171 acres. In every conveyance made, petitioner reserved all water rights. One-fourth of petitioner's production was used for beneficial uses on the 171 acres of overlying land in Raymond Basin Area, and three-fourths was exported for use outside of this area on nonoverlying lands. By the end of the 1918-19 season, petitioner's minimum extractions, extending over a period of five consecutive years, amounted to 379 acre feet of water. Before that, its production was 338 acre feet. Three-fourths of its maintained extraction, or 284.25 acre feet, represent prescriptive rights; that is, water diverted from the Basin and used on nonoverlying lands. To the close of the 1923-24 season, petitioner had a minimum maintained production on its lands of 403 acre feet and exported three-fourths of this quantity. Between the last mentioned season and the close of the 1928-29 season, petitioner's minimum sustained production amounted to 521 acre feet per annum, of which 118 acre feet was new production which had matured since 1924. Of this new production, 29.50 acre feet was used on overlying lands, and 88.50 acre feet represented a new prescriptive right acquired during this period. Petitioner claims, and all the evidence sustains its position, that by the close of the 1928-1929 season it had acquired a prescriptive right to divert and use from its lands overlying Raymond Basin 390.75 acre feet, and 130.25 acre feet for overlying uses on said lands, or a total of 521 acre feet per annum. [Table 5 and Plate 3, Ex. 1, pp. 30-32.]

11. The findings and judgment, in effect, made petitioner an involuntary party to the stipulation for judgment and to the proposed judgment annexed to the stipulation of plaintiff and other nondisclaiming defendants. The Court found, in accordance with the stipulation that the water underlying the Raymond Basin Area was percolating water, and not a stream or streams, that there had been, and was, an overdraft of 6,000 acre feet per year, and that the production of the parties to the action, other than from the tributary streams, should be reduced by the amount of the overdraft, and the reduction should be shared ratably by petitioner with all other parties producing from the underground supply, but without requiring any reduction by those diverting from tributary surface streams. (Op. Dist. Ct. App. p. 602.)

12. By the judgment, petitioner's production for all purposes was determined as 521 acre feet per annum, which quantity was classified as petitioner's "unadjusted right." The judgment, however, limited petitioner's total diversion to 359 acre feet for all purposes. In arriving at the foregoing conclusion, the Superior Court determined, as a matter of law, that all of the rights of the parties were of equal priority and of the same legal force and effect, and that each of the parties had acquired a prescriptive right against the other for the quantity of water which the Court determined that each of the parties was entitled to divert and use, and no distinction was made between the rights of overlying owners and rights acquired by appropriation of whatever priority or by prescription. [Clk. Tr. p. 884 *et seq.*]

13. The Referee's Report shows and Gleason testified that the Referee had nothing whatever to do with the recommendation or determination of "decreed rights" allocating water on the basis of safe yield. [Rep. Tr., Vol.

X, p. 592 and pages following.] These "decreed rights" were arrived at by the Superior Court exclusively on the basis of the stipulation between the parties to the action, other than petitioner.

14. There was no finding that petitioner had knowledge of the existence of the alleged overdraft, or that any party had suffered any involuntary diminution in its production as the result of the production of other users. (Op. Dist. Ct. App. pp. 616, 595.)

15. Both the District Court of Appeal and the Supreme Court of California held that petitioner was not denied due process by the reference to the Division of Water Resources, or the receipt of the Report of the Referee in evidence, or the treatment thereof as *prima facie* evidence. (Op. Dist. Ct. App. p. 588; Op. Supreme Ct. p. 901.)

16. The District Court of Appeal and the Supreme Court of California both held that the Superior Court properly adjudicated the rights of the defendants *inter se.* (Op. Dist. Ct. App. p. 582; Op. Sup. Ct. pp. 901-902.)

17. The District Court of Appeal held that petitioner was entitled to have the Superior Court determine the issue of estoppel raised in its answer, but the Supreme Court of California held to the contrary. (Op. Dist. Ct. App. p. 604; Op. Sup. Ct. p. 918.)

18. The District Court of Appeal reversed the judgment on the merits on the ground that in ordering the reduction of water to the safe yield of the Raymond Basin Area, the Superior Court had erred in making the reduction ratably without priorities. (Op. Dist. Ct. App. p. 599.) The Supreme Court of California affirmed the judgment of the Superior Court on the merits. In that behalf the Supreme Court overruled the applicable pre-

existing law retroactively and held the reduction of the water table alone showed that the several parties to the action had acquired title against each other by prescription, and the lowering of the water level in petitioner's wells alone gave it constructive knowledge of such adverse user by the other parties to the action. (Op. Sup. Ct. pp. 911-913.)

19. Inquiries pursued by a prudent man, prior to the decision of the court in the instant case, would have led to the discovery that under California law the existence of an overdraft in the Raymond Basin Area did not render the takings of the plaintiff and the defendants in said action, including petitioner, mutually adverse because the element of adverse use was not supplied by the existence of the overdraft.

20. Inquiry by a prudent man prior to the decision of the Supreme Court of California in the instant case, and the three to four and one-half years' investigation pursued by the Division of Water Resources as Referee, would have shown that had there been any general lowering of the water table that fact was equivocal, and therefore did not give constructive knowledge.

In particular, such inquiry would have shown that Harold Conkling, Deputy State Engineer of California, under whose general direction the Referee's Report was prepared, read a paper before the American Society of Civil Engineers, which was published in April, 1936, in the Proceedings of that Society, in which he reviewed a Bulletin prepared by himself for the Division of Water Rights (as it was then called) of the Department of Pub-

lic Works of the State of California on the San Gabriel Basin (of which the Raymond Basin Area is a part); and that in said review he stated:

> "The recession of the water-table is due partly to the increased draft to supply this demand, but mainly to lack of rainfall during the period, 1916 to 1934, and cumulative overdraft is not indicated." (P. 756.)

Such inquiry also would have shown that Professor C. F. Tolman, Professor of Economic Geology at Stanford University, the leading authority on ground water, in his work "Ground Water" says:

> "It must not be concluded that a considerable lowering of the water table is serious or is detrimental to the water supply. Just as a surface reservoir must be drawn down in order to catch and preserve flood flow, so the subsurface-reservoir level (water table) must be lowered sufficiently to prevent loss by effluent seepage. A decrease in the area of effluent seepage increases the area of influent seepage (absorptive area) and in turn increases the rate of ground-water recharge. A depleted reservoir at the end of the dry season or cycle of dry years is necessary if the water is to be salvaged in the following wet season or cycle. In legal controversies an unreasonable view has been taken in the past in regard to the necessity of maintaining the water table at the 'natural level.'" (P. 469.)

And at page 487:

> "Many of the underground reservoirs are so large that they have capacity to carry over great quantities of water not only from a wet season to the following dry season but also from a period of wet years to a period of dry years. However, to utilize these reservoirs fully it is necessary to pump enough water out

of them to make room for all the inflow during the wettest seasons and during the periods of successive years of heavy precipitation. This was well illustrated by some of the underground reservoirs of Southern California, whose water tables, under heavy pumping for irrigation, went down a little lower each summer than they had risen in the previous winter, until it appeared that excessive depletion must inevitably compel reduction in irrigation. Then came a period of wet winters when recharge occurred to a remarkable extent and the water levels rose beyond all expectations." (33 A. C. p. 932.)

Questions Presented.

1. May a state court, consistently with due process, rest its judgment depriving petitioner, a party to an action, of water rights solely upon the report of a referee, which is a state administrative agency with an uncertain and fluctuating personnel consisting of numerous officers and employees of the executive branch of the state government, and a stipulation of the other parties to the action for the allocation of water regardless of petitioner's priorities, where the state agency bases its report solely upon its own private investigation, without conducting a hearing, and neither the pleadings, nor the report, nor the stipulation disclose the nature, priority, character, or extent of the various claims or rights, if any, of the other parties to the action, particularly:

(a) Where the report is based partly on data in the files of the agency, partly on field work done by numerous employees, many of whom are unavailable for examination before the Court, partly on data furnished by parties to the action, other than petitioner, and partly on data furnished by, and studies made by, third persons, many of whom are

not identified or sworn, and the private investigation on which the report is based was carried on over a period of four and one-half years and cost over $50,000,00, and the report consists of approximately 800 large printed pages, with numerous maps, graphs, and tables.

(b) Where it is impossible to ascertain or segregate the particular contributions to the report of the various sources mentioned.

(c) Where, at the time of the trial of the cause, certain of the employees who did substantial portions of the field work were dead, in the South Pacific, Panama, in the Army, or otherwise beyond the reach of process.

(d) Where neither copies of the data taken from the files of the agency, nor the notes of the field investigators, nor the data furnished by parties to the action, other than petitioner, nor the data furnished, or studies made, by third persons, are attached to the report, or otherwise returned to the Court.

(e) Where it cannot be ascertained whether any studies were made relative to the facts collected during the investigation prior to the preparation of the formal report, and if such intermediate studies were made they were destroyed.

(f) Where the only officer who signed the report did not participate in the investigation, was not produced or sworn, or otherwise made available, and was beyond the reach of process.

(g) Where an officer who wrote important parts of the report, including the findings, and revised the rest of the report "somewhat," did not participate in the detailed investigation.

(h) Where an officer who wrote other parts of the report supervised only part of the investigation, and could not say whether he had written parts of the report called to his attention.

(i) Where an employee who wrote other parts of the report, viz., the parts relating to geology, was beyond reach of process.

(j) Where the Superior Court accepted the Report of the Referee that there was a substantial overdraft in the use of ground water, but refused to determine whether or not plaintiff was estopped from asserting any claims because plaintiff had diverted surface waters, and this diversion caused or contributed to the overdraft, although that was made a part of the subject matter of investigation and report of the Referee.

2. May a state court, consistently with due process, take water rights in a 40 square mile valley area away from petitioner and give them to twenty-five other parties to an action, on the fiction that merely because of an overdraft in the area all of the parties to the action, including petitioner, acquired mutual prescriptive rights against each other, and on the additional fiction that lowering the water levels in petitioner's six wells gave petitioner notice of the lowering of the water table in the entire area, and hence of the overdraft, when, as a matter of fact, no one could determine in advance the significance of the lowering of the water table, and under existing law prescriptive rights could be gained against petitioner by other parties to the action only severally, and not collectively, and only by the actual taking of petitioner's water adversely for a period of five years, upon notice to petitioner of such adverse taking, and under existing

law petitioner had no notice of adverse user by the other parties to the action, and no cause of action against the other parties merely by reason of the overdraft or the lowering of the water tables, particularly:

(a) Where there is neither pleading, notice, evidence, finding, nor determination as to the nature, character, or extent of the prescriptive rights of any of the parties other than petitioner.

(b) Where petitioner's water is taken away by the Court and given to the other parties to the action in gross, and not separately, although their rights, if any, are separate.

(c) Where petitioner had no actual or constructive knowledge of the claims, if any, of the other parties to the action.

(d) Where the other parties to the action did not disclose their respective claims, if any, prior to the trial, or at the trial, and it was impossible for petitioner to discover the nature, character, or extent of such claims, or defend against the same.

(e) Where the Referee made no report upon, or determination of, or attempt to determine, the respective rights of the parties to the cause, and the determination of the trial court in that behalf rested solely on the stipulation of the parties to the action, other than petitioner.

3. Under the facts and circumstances recited in Question 1, may the Court require petitioner to reimburse the Division of Water Resources for petitioner's proportionate share of the $50,000.00 expended by the Division in the conduct of its investigation and the preparation of its report.

The Reasons Relied Upon for the Issuance of the Writ.

1. Petitioner has been deprived of both procedural and substantive due process.

2. The case is one of gravity and importance affecting thousands of persons and property values of hundreds of millions of dollars, throughout Southern California, as well as in the forty square mile highly urbanized area involved in the litigation.

3. The precedent here created of sanctioning the appointment, as referee, of a department of the executive branch of a state government, of indefinite and constantly changing personnel, involves such a departure from previous practice (which has everywhere and always required the appointment of one or more definitely identifiable human beings to such an office) that it should be determined by this Court whether such procedure constitutes due process of law guaranteed by the Fourteenth Amendment.

4. It is important to the owners of water rights throughout the semi-arid states of the west that this Court determine whether state courts may by retroactive change of long established law deprive such owners of their rights without notice and on opportunity to be heard, on the basis of fictions and arbitrary assumptions having no foundation in fact and impossible of rational application.

5. The importance of a decision of this Court both in and out of California is shown by the following from *Hillman v. Hardwick* (1891), 3 Idaho, 255, 260-261, 28 Pac. 438 (reviewing a judgment apportioning waters

of a stream among several appropriators without regard to priorities):

> "We say unprecedented because this question, under statutes identical with that of Idaho (Idaho Rev. Stat. §3159), has been decided so often in favor of the prior appropriator that it has been generally conceded, both by professionals and profanes, as a settled question; as instance the question had been decided up to 1889 twice by the Supreme Court of the United States, seventeen times by the Supreme Court of California, five times by the Supreme Court of Colorado, six times by the Supreme Court of Nevada, twice by the Supreme Court of Montana, once by the Supreme Court of New Mexico, twice by the Supreme Court of Utah, once by the Supreme Court of Oregon and repeatedly by the Supreme Court of Idaho. In fact the decision of the learned district judge in this case stands alone. We have been unable, by the most diligent search, to find a precedent or parallel for it."

6. The gravity and importance of the case is recognized in the opinions of the District Court of Appeal and the Supreme Court of Califorina, as shown by the following:

> "The issues are extremely complex and *are of great importance to many thousands of people who are dependent upon the parties involved to furnish an adequate supply of water.*" (Op. Dist. Ct. App. p. 576.)

> "The point at issue is of great moment, *not only to appellant but to others who may be similarly situated.*" (Op. Dist. Ct. App. p. 608.)

"Every recent major water law decision of this court has expressly or impliedly approved the reference procedure provided by section 24 and has recommended, in view of the complexity of the factual issues in water cases and *the great public interests involved,* that the trial courts seek the aid of the expert advice and assistance provided for in that section." (Op. Sup. Ct. p. 900.)

It is respectfully submitted that this Petition for Certiorari should be granted to review the judgments of the Supreme Court of California in causes numbered L. A. No. 19610 and L. A. No. 19186 in the files of said Court.

Respectfully submitted,

JOSEPH L. LEWINSON,
RICHARD C. GOODSPEED,
Attorneys for Petitioner.

State of California, County of Los Angeles—ss.

Joseph L. Lewinson, being duly sworn, deposes and says:

That he is a member of the Bar of the Supreme Court of the United States; that he is one of the attorneys for the petitioner herein, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

JOSEPH L. LEWINSON.

Subscribed and sworn to before me this 22nd day of September, 1949.

CORA A. KELSO,
Notary Public in and for Said County and State.

IN THE

Supreme Court of the United States

October Term, 1949

No. .....

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The opinions of the Supreme Court of the State of California were rendered on June 3, 1949, and are reported in 33 A. C. 891 and 937, 207 P. 2d 17 and 46, and appear in the Record filed herewith.

The opinion of the District Court of Appeal of the State of California was rendered on May 6, 1947, and is reported in 79 A. C. A. 562, 180 P. 2d 699, and appears in the Record filed herewith.

Jurisdiction.

The grounds for jurisdiction are:

1. The judgment of the Supreme Court of the State of California was entered on June 3, 1949. The petition for rehearing was denied on June 27, 1949.

2. The judgment of the Supreme Court of California, which is the final decision of the highest court of that state (affirming the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, and reversing the judgment of the District Court of Appeal for the Second Appellate District of the State of California) deprived petitioner of both procedural and substantative due process of law, contrary to the Constitution of the United States and the 14th Amendment thereto, in this:

(a) The judgment of the Superior Court rested solely on the report of a referee, a state agency in its quasi-corporate character, and a stipulation of the parties, other than petitioner, and the report was

based solely upon a private investigation, unfairly conducted, and without a hearing, and the stipulation allocated a substantial portion of petitioner's water to the parties to the stipulation, without regard to petitioner's prior rights.

(b) The judgment of the Supreme Court deprived petitioner of valuable water rights, guaranteed to it by the long established law of the state, by changing the pre-existing law retroactively, and substituting therefor an arbitrary rule based on fiction and impossible of rational application.

3. The statute which the jurisdiction of this Court has invoked is Title 28 United States Code, Section 1257, Subdivision 3. Petitioner's claims of deprivation of due process were set up in the Superior Court, the District Court of Appeal, and the Supreme Court of California. [Rep. Tr. p. 18; App. Op. Br. Vol. 2, pp. 294, 321, 322; App. Pet. for Rehrg. Sup. Ct. Cal. in No. 19610, pp. 35, 43, 52, 53; App. Pet. Rehrg. in No. 19186, p. 4.]

4. The cases believed particularly to sustain the jurisdiction are: *Morgan v. United States* (1936), 298 U. S. 468; *Morgan v. United States* (1938), 304 U. S. 1; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937), 301 U. S. 292; *Carter v. Kubler* (1943), 320 U. S. 243; *Shelley v. Kraemer* (1948), 334 U. S. 1, and *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U. S. 673.

Statement.

1. The Raymond Basin Area is a 40 square mile valley area, bounded on the south by the Raymond fault, and is part of a 92 square mile water shed. Petitioner has six wells located in 171 acres in the southeasterly part of the western unit of the area. (Pet. for Cert. "Summary, etc.," pars. 1, 3, 10.)

2. In 1937 the City of Pasadena brought an action against over twenty-five parties who, together with the City of Pasadena, were using substantially all of the water in the area. The action was to quiet title to 14,600 acre feet of water annually, which the City of Pasadena claimed as prior appropriator. Petitioner was one of the defendants. The defendants, including petitioner, each answered separately. The answers severally denied plaintiff's claims as to each of the defendants. The answers were not cross served. There was no claim to prescriptive rights set up in the complaint or in any of the answers or any other pleadings. (Pet. for Cert. par. 1.)

3. On February 8, 1939, the Superior Court, over the objections of petitioner, made an order referring all of the issues in the case to the Division of Water Resources in its quasi-corporate character, and on June 9, 1939, the court, again over the objections of petitioner, made an order instructing the Referee "that the issues in the above entitled cause embrace an adjudication of the rights of the defendants *inter se* and the rights of each and every party as against each and every other party." (Pet. for Cert. pars. 4-6.)

4. On June 12, 1943, the Referee reported that the safe yield of water in the Basin was 18,000 acre feet annually, but that for many years 24,000 acre feet had been

pumped annually, practically all of it by the parties to the action. The report showed the annual quantities which had been withdrawn by each of the parties for a period of five years or more next preceding the bringing of suit. The report of the Referee both as to the safe yield and the actual withdrawals was based on highly controversial matter. The Referee made no recommendation or determination of the extent or priority of the rights of the respective parties or of the amounts by which the withdrawals of each of the parties should be reduced in order to reduce the entire withdrawals to the safe yield. (Pet. for Cert. par. 7.)

5. Subsequent to the filing of the Referee's Report, the parties to the action, other than petitioner, entered into a stipulation by which they authorized the Court to enter judgment determining that the withdrawals by the several parties found by the Referee should be designated "unadjusted rights," and these rights should be reduced proportionately so that the water taken by all would be reduced to the safe yield. The stipulation authorized the Court to designate the rights so reduced as "decreed rights." The stipulation declared that "the present unadjusted rights, if any," of petitioner "are 521 acre feet annually"; that "the rights of all the parties to this action are of equal priority and of the same legal force and effect"; that "petitioner should be restricted in the amount of water pumped or otherwise taken from the ground by reason of the existing overdraft, in the same manner as provided in said judgment [attached to the stipulation] as to the parties hereto, and that such restriction should be determined by reducing present unadjusted rights, if any, of [petitioner] in the proportion that the safe yield of said Unit * * * bears to the

aggregate of such rights of the parties to the action in said Unit"; and the "rights of the [petitioner] so reduced in acre feet are * * * 359." The stipulation authorized an immediate judgment as to the parties to the stipulation, and the Court forthwith made an order to that end. (Pet. for Cert. par. 9.)

6. Upon the cause coming on for hearing in the Superior Court, the Referee's Report was received as the sole evidence in favor of plaintiff and the parties defendant, other than petitioner (except as to formal proof and evidence on the issue of estoppel raised in petitioner's answer, which issue was not determined by the Court). The Court made findings as to total withdrawals made by each of the parties and the safe yield in accordance with the Referee's Report, and entered judgment in accordance with the stipulation, adjudging petitioner had "unadjusted rights" to 521 acre feet annually, and reducing the rights of petitioner to the "decreed rights" to 359 acre feet annually. The Court made the judgment operative from the time of its entry, although the report of the Referee dealt with the matter as of the time of the commencement of the action seven years earlier. (Pet. for Cert. par. 10; Op. Dist. Ct. App. p. 608.)

There was no evidence and no finding that petitioner had any notice or knowledge of the existence of the overdraft, and the record discloses no fact showing that any appropriator had suffered an involuntary diminution as the result of the production of other users. (Pet. for Cert. par. 14.)

7. "Appellant also challenge[d] the sufficiency of the evidence in numerous particulars to support the findings of the trial court, including the findings of the existence and the amount of the overdraft. The findings of the

trial court relating to the physical facts involved, including those as to overdraft, are based largely[1] upon the report of the referee, which report appellant attempted to rebut by other evidence. The trial court, however, resolved the conflict in evidence thus created against appellant." (Op. Dist. Ct. App. p. 571.)

8. The Referee's Report is based solely upon its private investigation, without conducting a hearing. The report is based partly on data in the files of the Division of Water Resources, partly on field work done by numerous employees, partly on data furnished by parties to the action, other than petitioner, and partly on data furnished by, and studies made by, third persons, some of whom are not identified. The private investigation on which the report is based was carried on over a period of from three to four and one-half years and cost over $50,000.00. The report consists of approximately 800 large printed pages, with numerous maps, graphs, and tables. It is impossible from the report itself to ascertain or segregate the particular contribution of the various sources mentioned, and officers of the Division were unable to allocate the various contributions.

At the time of the trial of the cause various of the employees who did substantial portions of the field work were in the South Pacific, Panama, in the Army, deceased, or otherwise beyond the reach of process. Neither copies of the data taken from the files of the Division of Water Resources, nor the notes of the field investigators, nor the data furnished by parties to the action, other than petitioner nor the data furnished or studies made by third

---

[1]For the purposes of the present proceeding "largely" should read "entirely." (Op. Dist. Ct. App. p. 602.)

persons, were attached to the report or filed with the Court. It could not be ascertained at the trial whether any studies were made relative to the facts collected during the investigation prior to the preparation of the formal report, and if such intermediate studies were made, the testimony was that they had been destroyed. The State Engineer, who signed the report, did not participate in the investigation. The Deputy State Engineer, who wrote important parts of the report, including the findings, and revised the rest of the report, or much of it, did not participate in the detailed investigation. The Senior Hydraulic Engineer, who wrote other parts of the report, supervised only part of the investigation, and could not say whether he had written parts of the report called to his attention. The Assistant Engineer Geologist, who wrote other parts of the report, was beyond the reach of process. (Pet. for Cert. par. 7.)

9. The Superior Court refused to determine the issue of estoppel raised in petitioner's answer, namely, that the City of Pasadena was estopped from relying on the overdraft, or the alleged overdraft, because the City of Pasadena itself had contributed to said overdraft, or alleged overdraft, by diverting water from surface streams in the part of the water shed not included in the 40 square mile valley area. (Pet. for Cert. par. 10.)

10. Petitioner claimed one-fourth of its water as overlying land owner, and three-fourths as prior appropriator. The District Court of Appeal held petitioner was prior appropriator as to the entire "unadjusted right." (Op. 595, 596, 598.) The Supreme Court of California thought it unnecessary to determine whether petitioner held partly as overlying owner, and partly as prior appropriator. (Op. 910, 914.)

11. The Supreme Court of California held that petitioner was not denied due process by the order of reference to the Division of Water Resources or the receipt of the report in evidence or the treatment thereof as *prima facie* evidence. (Pet. for Cert. par. 15.)

12. The Supreme Court of California also held that the order of reference and instructions to the Referee and the stipulation for judgment of the parties to the action, other than petitioner, severally apprised petitioner that the issues had been enlarged to include claims of all the parties against each other, although, as a matter of fact, neither the instructions nor the stipulation advised petitioner of the nature, character, priority, or extent of the claims, if any, of the several defendants or any of them against petitioner. (Pet. for Cert. par. 16.)

13. The Supreme Court of California held that the Superior Court was justified in refusing to determine the issue of estoppel. (Pet. for Cert. par. 17.)

14. The Supreme Court of California affirmed the judgment of the Superior Court on the merits, on the fiction that merely because of an overdraft in the area all of the parties to the action, including petitioner, acquired mutual prescriptive rights against each other, and on the additional fiction that the lowering of water levels in petitioner's six wells gave petitioner notice of the lowering of the water table in the entire area, and hence of the overdraft, when, as a matter of fact, no one could determine in advance the significance of the lowering of the water table, and under existing law prescriptive rights could be gained against petitioner by the other parties to the action only severally, and not collectively, and only by the taking of petitioner's water adversely for a period of five years and upon notice to petitioner of such adverse

taking, and under existing law petitioner had no notice of adverse user by the other parties to the action, and no cause of action against the other parties merely by reason of the overdraft or the lowering of the water table. (Pet. for Cert. par. 18.)

Constitutional and Statutory Provisions.

Constitution of California, Art. XIV, Sec. 3:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is

lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Section 24 of the *Water Commission Act:*

"In case suit is brought in any court of competent jurisdiction for determination of rights to water or the use of water, the court may, in its discretion, order a reference thereof to the state water commission [now Division of Water Resources], as referee, which reference may include any issue or issues, or all issues, involved in such suit. Also, the court may, in its discretion, refer such a suit to the state water commission for investigation of and report upon any or more or all of the physical facts involved, in which event, said commission may, in its discretion, base its report solely upon its own investigation or investigations or in addition thereto may hold a hearing or hearings and take testimony and the report filed by the commission upon such a reference for investigation by it shall be *prima facie* evidence of the physical facts therein found; provided, however, that the court shall hear such evidence as may be offered by any party to rebut such report of the state water commission or such *prima facie* evidence."

California Civil Code, Section 1414:

"As between appropriators, the one first in time is the one first in right." (Enacted 1872.)

California Civil Code, Section 1007:

"Occupancy of the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or

corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to or owned by any county, city and county, city, irrigation district, public or municipal corporation or any department or agency thereof, shall ever ripen into any title, interest or right against such county, city and county, city, public or municipal corporation, irrigation district, or any department or agency thereof or any agency created or authorized by the Constitution or any law of this State for the administration of any State school, college or university. The exemption of certain classes of governmental property is intended as a limitation and shall not be deemed to subject to the operation of this section any classes of governmental property which would not otherwise be subject thereto. [Enacted 1872; Am. Stats. 1935, p. 1592.]"

California Civil Code:

"§18. Notice is:

1. Actual—which consists in express information of a fact; or,

2. Constructive—which is imputed by law. [Enacted 1872.]

§19. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact. [Enacted 1872; Amended by Code Amdts. 1873-74, p. 182.]"

Specifications of Error.

1. The Supreme Court of California construed Section 24 of the Water Commission Act as authorizing a reference of all the issues in a cause for the determination of rights to water or the use of water, to the Division of Water Resources of the Department of Public Works of the State of California, in its *quasi* corporate character, as Referee, and as authorizing said Division to base its report solely upon its own investigation, without a hearing or hearings or taking testimony, and as giving the report filed by said Division as Referee on said basis the character of *prima facie* evidence, and as so construed said statute was violative of due process of law guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

2. The Supreme Court of California erred in finding and holding that in the case at bar the Referee's Report of the Division of Water Resources, Department of Public Works, State of California, in its quasi-corporate character, made on the basis of private investigation or investigations, without holding a hearing or hearings or taking testimony, was *prima facie* evidence or legally competent evidence, and said holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

3. The Supreme Court of California erred in finding and holding that petitioner was obligated to pay a por-

tion of the expenses of the Division of Water Resources as Referee, and said holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

4. The Supreme Court of California erred in finding and holding that the pleadings or the order of reference or the report of the referee or the stipulation of the parties to the action, other than petitioner, or all of them together, gave petitioner notice that defendants, or any of the other defendants, claimed a prescriptive right or prescriptive rights to take a portion of petitioner's water awarded by the Superior Court to plaintiff and the other defendants, to take any part of plaintiff's water, and such holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

5. The Supreme Court of California erred in finding and holding that plaintiff and the other defendants jointly had prescriptive rights to take the portion of petitioner's water awarded them by the Superior Court, and such holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

6. The Supreme Court of California erred in finding and holding that plaintiff and the other defendants severally had prescriptive rights to take the portion of petitioner's water awarded them by the Superior Court, and such holding deprived petitioner of property without due

process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

7. The Supreme Court of California erred in finding and holding that the overdraft or the lowering of the water tables in the forty square mile Raymond Basin Area alone constituted adverse user of petitioner's water by plaintiff and each of the several defendants, other than petitioner, and that the lowering of the water tables alone gave petitioner constructive notice of such adverse user, and such holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

8. The Supreme Court of California erred in finding and holding that petitioner was an involuntary party to the stipulation of plaintiff and the other parties to the action for the reduction of the use of water ratably, without regard to priorities, and such holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

9. The Supreme Court of California erred in overruling retroactively the existing law under which petitioner had rights of priority, and such holding deprived petitioner of property without due process of law as guaranteed by the Constitution of the United States and Amendment Fourteen thereto.

Summary of Argument.

1. The Supreme Court of California deprived petitioner of a full, fair, and open hearing essential to due process, by affirming the judgment of the Superior Court taking away from petitioner water rights solely on the report of a state agency appointed as Referee in its corporate character, and a stipulation of the other parties to the action for allocation of water, regardless of petitioner's priorities, because the state agency based its report solely upon its own private investigation, without conducting a hearing, and neither the pleadings, the report, nor the stipulation disclosed the nature or character of the prescriptive claims, if any, of the other parties to the action against petitioner, and also because:

(a) The report, unverified by anyone, was based partly on data in the files of the agency, partly on field work done by numerous employees, partly on data furnished by undisclosed representatives of the parties to the action, other than petitioner, and partly on data furnished by, and studies made by, other third persons.

(b) It is impossible to ascertain or segregate the particular contributions to the report of the various sources mentioned.

(c) At the time of the trial of the cause, certain of the employees who did substantial portions of the field work were in the South Pacific, Panama, in the Army, deceased, or otherwise beyond the reach of process.

(d) Neither copies of the data taken from the files of the agency, nor the notes of the field investigators, nor the data furnished by the parties to the

action, other than petitioner, nor the data furnished, or studies made, by third persons, were attached to the report or filed with the Court.

(e) It cannot be ascertained whether any studies were made relative to the facts collected during the investigation prior to the preparation of the formal report, and if such intermediate studies were made they were destroyed.

(f) The officer who signed the report did not participate in the investigation.

(g) An officer who wrote important parts of the report, including the findings, and revised the rest of the report, or much of it, did not participate in the detailed investigation.

(h) An officer who wrote other parts of the report only supervised part of the investigation, and could not say whether he had written parts of the report called to his attention.

(i) An employee who wrote other parts of the report was beyond the reach of process.

(j) The Superior Court accepted the Report of the Referee that there was a substantial overdraft in the use of the water of the area, but refused to determine whether or not plaintiff was estopped from asserting any claims under the overdraft by reason of the diversion of tributary surface waters by it, which contributed to the overdraft, as shown by the report.

2. The Supreme Court of California deprived petitioner of due process by taking away the water rights of petitioner and awarding such rights to the other parties to the action, in disregard of existing law, under which

petitioner as an overlying owner, and as a prior appropriator, or as prior appropriator, was entitled to the water taken away from it and given to the other parties to the action, and in that behalf the Supreme Court of California changed the existing law retroactively, and held by arbitrary fiat that the other parties to the action had acquired prescriptive rights against petitioner by adverse user, although

(a) There was neither evidence, finding, nor determination as to the nature, character, or existence of the prescriptive rights, if any, of the other parties to the action, or any of them or of the facts essential to prescription.

(b) Petitioner's water was taken away, and prescriptive rights thereto given to the other parties to the action in gross, and not separately, although their rights, if any, were separate, and the basis of the Court's action in that behalf was a stipulation of the parties, other than petitioner, allocating the water without regard to petitioner's priorities under existing law.

(c) Petitioner had neither actual knowledge nor constructive notice of the prescriptive claims, if any, of the other parties to the action, or any of them.

(d) It was impossible for petitioner to discover the nature, character, priority, or extent of the prescriptive claims, if any, of the other parties to the action, or to defend against the same.

3. The Supreme Court of California deprived petitioner of due process in requiring it to pay its proportionate part of the expenses of the Division of Water Resources as Referee.

Argument.

POINT I.

The Judgment of the Supreme Court of California Deprived Petitioner of Due Process in Affirming the Judgment of the Superior Court, Because the Judgment of the Superior Court Rested Alone on a Report of a State Agency Appointed as Referee in Its Quasi-corporate Character, and a Stipulation of the Parties, Other Than Petitioner, and Neither the Report nor the Stipulation Accorded Petitioner the Full, Open, and Fair Hearing Required by Due Process, nor Did the Hearing Before the Superior Court Meet Such Requirements.

It is unnecessary again to enumerate the infirmities in the report, the stipulation, or the proceedings before the Superior Court. They are enumerated in the Petition for Certiorari, are briefly indicated in the first question listed in the Petition for Certiorari, under "Questions Presented," and are summarized in our "Summary of Argument."

The point is ruled by *Morgan v. United States* (1936), 298 U. S. 469; (1937), 304 U. S. 1; *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937), 301 U. S. 292; *Carter v. Kubler* (1943), 320 U. S. 243.

In the first *Morgan* case proceedings had been brought in the District Court to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for livestock at the Kansas City Stockyards. Plaintiff alleged that the Secretary of Agriculture, without warrant of law, delegated to Acting Secretaries the determination of issues with respect to the reasonableness of rates involved, and that the Secretary at the time he signed the order had not personally heard or read any of the evidence presented at any hearing in connection with the

proceeding but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture, out of the presence of the appellants or any of their representatives. On motion of the Government, the District Court struck out the allegations. In a unanimous opinion, written by Chief Justice Hughes, this Court held the action of the District Court was erroneous because the facts alleged showed that plaintiff had been deprived of procedural due process by the Secretary.

Speaking for the whole Court, Chief Justice Hughes said in part:

> "But while the Assistant Secretary heard argument he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility.
>
> * * * * * * * *
>
> "The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. * * * Nothing can be treated as evidence which is not introduced as such. * * *
>
> * * * * * * * *
>
> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. * * *
>
> * * * * * * * *

"The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." (298 U. S. 479-482.)

In the second *Morgan* case it appeared that the Secretary had merely "dipped into" the record without carefully examining it, and that the Bureau of Animal Industry had prepared the findings. It also appeared that appellants had no knowledge of the specific claims of the Government that they were called upon to meet, until after the order entered by the Secretary; also on this point being made, the Secretary refused a rehearing. The judgment of the District Court dismissing the complaint was again reversed. Chief Justice Hughes, speaking for a unanimous Court, said:

"that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' —essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' * * *

* * * * * * * *

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet

them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated, * * * and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

* * * * * * * *

"If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing." (304 U. S. 14-20.)

Ohio Bell Telephone Company v. Public Utilities Commission (1937), 301 U. S. 292 arose out of a statutory proceeding initiated by the State Public Utilities Commission to ascertain the value of the property of the appellant, Ohio Bell Telephone Company, and fix its prospective rates. The statute made it mandatory for the Commission to ascertain the value of the property as "of a date certain" to be named. The date adopted for that purpose

was June 30, 1925. In its order the Commission did not confine itself to a valuation of the property as of the date certain. It undertook also to fix a valuation for each of the years 1926 to 1933 inclusive. For this purpose it took judicial notice of price trends during those years, modifying the value which it had found as of the date certain by the percentage of decline or rise applicable to the years thereafter. The first warning that it would do this came in 1934 with the filing of its report. By this course taken by the Commission "the proceeding to fix rates for the future on the basis of a date certain was thus transformed finally into a refund proceeding * * * for the refund of charges collected under bonds" (p. 298). On the basis of judicial notice of price trends and of the facts developed in the opinion of a federal court in another proceeding, the Commission made its order requiring refunds amounting to millions of dollars. The Company moved for a rehearing, which the Commission denied. The Company then filed petitions in error with the Supreme Court of Ohio, in accordance with the state practice. The Supreme Court of Ohio affirmed the Commission. The judgment of the Supreme Court of Ohio was reversed by this Court on the ground that the proceedings before the Commission deprived the Company of property without due process.

Speaking for a unanimous Court, Mr. Justice Cardozo said:

> "*First:* The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." (301 U. S. p. 300.)

After holding that the Commission was not entitled to rely on judicial notice, Mr. Justice Cardozo went on:

> "What was done by the Commission is subject, however, to an objection even deeper. * * * From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out." (301 U. S. p. 302.)

Concluding, Mr. Justice Cardozo said:

> "The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms.
>
> * * * * * * * *
>
> "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'
>
> * * * * * * * *
>
> "The right to such a hearing is one of 'the rudiments of fair play' (citing case) assured to every litigant by the Fourteenth Amendment as a minimal requirement. (Citing cases.) There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (301 U. S. pp. 304-305.)

In *Carter v. Kubler* (1943), 320 U. S. 243, it was held that an appraisal of a farmer-debtor's property for redemption purposes under the Bankruptcy Act, which provides that the valuation shall be fixed "in accordance with the evidence submitted at the hearing, may not be made by a conciliation commissioner partly on the basis of his personal investigation."

In *United States v. Dillman,* 5 Cir. (1945), 146 Fed. 2d 572 (certiorari denied 325 U. S. 870), the Court reversed a judgment in a condemnation case because the trial judge in valuing the premises had been accompanied by a government attorney and a police sergeant, who knew the entire area, and before making his decision the trial judge interviewed the Commissioners regarding their report.

The following is from the opinion:

> "The trial judge was in possession of information which he had obtained from the commissioners, from a personal inspection of the lands, and from an interview with the police sergeant, yet not one shred of this information is to be found in the record." (P. 575.)

In *Powhattan Mining Co. v. Ickes,* 6 Cir. (1941), 118 F. 2d 105, an order of the Bituminous Coal Division was set aside because a document in code was received in evidence, and the Director of the Division who conducted the hearing, and who knew the code, refused to supply it on the ground that it was confidential, and this despite the fact that the Director stated the document was merely corroborative and that his order might be justified on the merits, even though the document were disregarded.

In *Western Union Telegraph Co. v. Industrial Commission,* D. C. Minn. (1938), 24 Fed. Supp. 370, a three-

judge court set aside an order of the Commission fixing minimum wages for women throughout the state made solely on the basis of a study and investigation of an Advisory Board without holding hearings.

Said the Court:

> "It is too plain for argument, however, that neither State legislation, State decisions, nor Congressional action can modify or affect the requirements of due process under the Fourteenth Amendment of the Federal Constitution or shelter a governmental officer, board or commission from those requirements" (p. 377).

The Supreme Court of California undertook to justify its order on various grounds. None of these grounds, or all of them taken together, meets the principles laid down by this Court in the cases reviewed above; and, each of the grounds is untenable in itself.

The first point made by the Supreme Court of California is that what the Division of Water Resources did is executive, and not quasi-judicial, action. (33 A. C. p. 900.) This point is met by the passage quoted above from the opinion of Chief Justice Hughes in the first *Morgan* case. Moreover, if the action of the Division of Water Resources was executive only, then under all of the decisions of this Court petitioner has been denied the full, fair, and open hearing essential to due process.

Secondly, the Supreme Court of California undertakes to uphold the report on the ground that "the Court may appoint the Division to act as an investigator and expert witness." [R. p. 901.] This point is met by an earlier decision of the Supreme Court of California, sitting in bank, in *Fewel v. Fewel* (1943), 23 Cal. 2d 431. In that case it was unanimously held reversible error for the Supe-

rior Court to base its order solely on the report of an investigator authorized by statute to assist the Court in the transaction of the judicial business of said Court. Justice Schauer, one of the justices voting for a rehearing in the case at bar, said: "The Legislature would have no power to substitute an investigator for a judge. Neither does such legislation authorize a trial court to deny to the parties any of the usual attributes of a fair trial in open court upon due notice" (p. 434). Moreover, the report of a corporate or quasi-corporate body, written by many hands, based on private investigations of numerous employees, not participated in in its entirety by any of the authors of the report, can hardly be regarded as expert testimony. If it were so regarded, it would be grossly unfair to permit it to be used, because it could not be met by petitioner without developing the underlying facts in open court in accordance with the rules of evidence and calling qualified experts to give their opinions on the basis of personal knowledge or hypotheses established by the evidence. (*Everts v. Matteson* (1945), 68 Cal. App. 2d 577, 581; Annotation (1935), 98 A. L. R. 1109.)

Thirdly, the Supreme Court of California argued that petitioner was not deprived of due process, because petitioner was afforded the opportunity to examine some of the persons who worked on the report, and there was no showing that it sought "to obtain the testimony of persons not present." (33 A. C. p. 901.) Manifestly, this argument is both factually and legally unsound. The report itself and the testimony of the witnesses who were examined showed all the infirmities listed in subdivision 1 of our "Summary of Argument," and, besides, petitioner objected to going to trial during wartime and while employees who worked on the report were in Panama and the South Pacific or in the Army. Moreover, it would be

grossly unfair to require petitioner to assume the burden of following the labyrinth laid out by the Division of Water Resources during a period of four and one-half years at a cost of over $50,000.00 in order to try to discover what the officer in charge of the investigation and the officer who supervised much of the investigation were unable to state on the witness stand, and to undertake to do this by elaborate depositions in advance of trial.

Next, the Supreme Court of California cited *Fleming v. Bennett* (1941), 18 Cal. 2d 518. Nothing could better show the confusion of thought of the Court. In *Fleming v. Bennett* it was held that the Legislature was authorized to permit the filing of the report of a Referee made solely on the basis of private investigation, and to give the report of the Referee the status of *prima facie* evidence, and this on the authority of *Pacific Live Stock Company v. Lewis* (1916), 241 U. S. 440, although the Oregon statute involved in that case required a full and fair hearing, and the report of the Referee was made only after a full and fair hearing in which witnesses were sworn and examined and a record of all the evidence was preserved.

Finally, the Supreme Court of California cited *Peabody v. City of Vallejo* (1935), 2 Cal. 2d 351, in which the Court, referring to proceedings in cases to determine water rights, said:

> "If the attitude of the parties in a particular case be such as to embarras the court in the proper determination of the case in view of a larger public interest involved and for the protection of all concerned, or for other sufficient reasons, the court might well invoke the aid of the division of water rights of the board of public works [now Division of Water Resources] under section 24 of the Water Commission

> Act (Stats. of 1913, p. 1027, as amended by Stats. 1931, p. 2421; Deering's General Laws, vol. 3, p. 5017) in the determination of the rights to water and the use of water in accordance with the constitutional policy" (pp. 373-374).

In other words, if a trial judge cannot convince a party to enter into a stipulation giving away his water rights, then the trial judge may use the Division of Water Resources *in terrorem*. It may safely be said that that is just what occurred in the case at bar, and, in addition, when petitioner would not be terrorized into surrendering his water rights, he was involuntarily made a party to the stipulation of the other parties to the action by order of Court.

There is an additional element of gross unfairness in the proceedings in the Superior Court, namely, the action of the Superior Court in refusing to determine the rightfulness, extent and effect of the diversions of tributary surface water by the City of Pasadena, as expressly challenged and brought into issue by petitioner's answer, and relegating petitioner to independent and additional litigation in that behalf, but meanwhile imposing an injunction against petitioner's continued exercise of its priority rights. As said by the District Court of Appeal:

> "Appellant [petitioner] objects to the provision of the judgment permitting certain parties to continue their diversions of surface water contributing to the supply of ground water here in controversy in certain specified amounts purporting to be the maximum capacities of their respective diversion works and facilities within the five-year period prior to the institution of this litigation. This objection appears to us to be well taken. While it is true that this provision expressly exempts appellant [petitioner] from

its operation, its mere existence reduces the amount of water that would otherwise be available to appellant [petitioner]. We see no reason why a restriction entirely comparable to that imposed on the takers of ground water should not be placed upon diverters of surface water contributing to the ground water supply. It has long been recognized in California that the rights of users of a common supply of water are, subject to their respective priorities, correlative; and, consequently, when the supply is insufficient for all, it will be apportioned in accordance with the priorities of right. (Citing cases.) This principle of allocation of the common supply between users thereof has been applied not only where percolating water fed a stream but also where a stream fed percolating water. (Citing cases.)" (79 A. C. A. pp. 604-605.)

The plaintiff, City of Pasadena, took substantial quantities of water from a stream known as Eaton Creek, in Eaton Canyon, tributary to the general ground water supply in question, and was the only party to the litigation so to do. These diversions, petitioner claimed, were without right and should be abated as a step preliminary to any general reduction required of the parties, and particularly of petitioner. Plaintiff's diversions near the headwaters of said stream substantially reduced the amount of ground water supply available to petitioner, which made no surface diversions from the stream but developed its water from wells in the lower end of the watershed thereof, and therefore depended upon the continued flow of said stream for the maintenance of its ground water supply to the extent that said stream contributed thereto in its natural state. Petitioner had no source of water supply other than its wells in the area in suit.

At page 179, Vol. 1, of the Referee's Report, the following is found on this subject:

"Before development began all the discharge of the streams which enter the Area percolated and reached the ground water except in floods. In other words, these streams in all except flood periods were on the surface in the granite mountains and beneath the surface in the alluvial valley. Deprivation of the ground water supply is accomplished either by diverting the surface stream before it percolates to the ground water or pumping from the ground water after the surface stream has percolated and become ground water. Thus, the diversion of these streams for irrigation of the Area was among the earliest deprivations of the ground water supply, and the change in culture due to this diversion gave among the first increases in ground water supply from precipitation.

"Although only safe yield of the supply now reaching the ground water has been considered heretofore in this report, the safe yield of the Area is in reality the sum of the water which can be diverted economically from the streams plus the water which may be economically pumped without exceeding the recharge. Those entities which divert the surface streams and also pump from the ground water decrease or increase their pumping in a direction inverse to the change in discharge of the streams. Consequently, there is a considerable seasonal and annual variation in pumping due to variation in the stream flow.

"The amount of water pumped or the amount which formerly percolated but which is now diverted from a stream by a group or individual using water within the Area is not the measure of the deprivation of the water supply by the group or individual because the increase in deep percolation from the surface on which the water is used compensates in part.

In sewered areas this increase in deep percolation is reduced with a corresponding increase in depletion equal to the total amount of the sewage. Water derived from local sources which is exported for use elsewhere has no effect on the amount of deep percolation and is therefore a total loss to the Area."

POINT II.

The Petitioner Was Deprived of Due Process by the Judgment of the Supreme Court of California Holding That the Other Parties to the Action Had Collectively Become Entitled to Plaintiff's Water by Prescription Merely Because There Was an Overdraft in the Area or a Lowering of the Water Table; Said Decision Is Arbitrary and Impossible of Rational Application; Under Pre-existing Law Prescriptive Rights Could Be Gained by the Other Parties Only Severally, and Not Collectively, and Only by the Actual Taking of Petitioner's Water Adversely for a Period of Five Years, With Notice to Petitioner of Such Adverse Taking; and Under Pre-existing Law Petitioner Had No Notice of Adverse User by the Other Parties to the Action and No Cause of Action Against the Other Parties Merely by Reason of an Overdraft or the Lowering of the Water Table.

In *Shelley v. Kraemer* (1947), 334 U. S. 1, it was said by Mr. Chief Justice Vinson:

> "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." (P. 17.)

After reviewing authorities, the Chief Justice summed up as follows:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." (P. 18.)

In *Hurd v. Hodge,* U. S. App. D. C. (1947), 162 F. 2d 233 (reversed in 334 U. S. 24), Edgerton, J., dissenting, said:

> "Since courts are arms of government they are subject, like legislatures and executive officers, to the restrictions that the Constitution imposes on government. Every case that holds legislation unconstitutional holds in terms or in effect that its judicial enforcement would be unconstitutional. The Constitution does not exempt any kind of judicial action from the requirements of due process of law. Not only legislation and procedure but judicially adopted rules of substantive law, including equity, are invalid when they conflict with these requirements. Rules which the due process clause forbids legislatures to enact it forbids courts to adopt, for substantive due process is not a matter of method. A judicial decree which would be invalid if it had legislative sanction is not validated by lack of legislative sanction." (Pp. 239-240.)

In *Muhlken v. New York & Harlem Railroad Co.* (1905), 197 U. S. 544, it was held that a decision of the New York Court of Appeals overruling prior decisions, under which the owner of real estate was entitled to compensation for deprivation of the right of light and air in a condemnation suit brought by an elevated railroad, deprived petitioner of property without due process of law.

Peterson v. Colorado, ex rel (1907), 205 U. S. 454, and *Dunbar v. New York* (1920), 251 U. S. 516, without citing the *Muhlken* case, appeared to reach a different conclusion.

If the cases referred to impair the authority of the *Muhlken* case, it is submitted the authority of the *Muhlken* case is restored by the *Shelley* case.

Commentators have long argued that the *Patterson* case and the *Dunbar* case should be overruled because they rest on the untenable theory of Blackstone that courts do not make law but only declare it.

Stimson, "Retroactive Application of Law" (1939), 38 Mich. Law Rev. 30;

Spruill, "The Effect of an Overruling Decision" (1940), 18 North Carolina Law Rev. 199.

Vinson, J., as he then was, repudiated Blackstone's declaratory theory in *Warring v. Colpoys,* D. C. App. (1941), 122 F. 2d 642 (Certiorari denied 314 U. S. 678).

Even before the decision in the *Shelley* case it was held in *Brinkerhoff-Faris Trust & Savings Company v. Hill* (1930), 281 U. S. 673, that due process was denied by a decision of a state court denying an injunction against the collection of a tax based on an alleged discriminatory assessment, on the ground that the plaintiff had a remedy by

complaining to the state tax commission before the tax books were delivered to the collector, and was guilty of laches in not doing so, where prior to the decision in the later case an application to the state tax commission would have been unavailing because the highest court of the state had held in a former case that the tax commission was without power to afford relief, and at the time of the decision in the later case if it had such power the time for filing such complaint had expired.

It is submitted that the *Brinkerhoff-Faris* case and the *Shelley* case are both controlling here.

Respondents were hard put in the District Court of Appeal to defend their judgment, resting as it did solely on the finding of an overdraft and the stipulation of the parties other than petitioner for ratable reduction regardless of priorities. Existing state law and the Federal Constitution alike stood in their way. Under existing state law, the rights of overlying owners corresponded to riparian rights and the rule as to aappropriators was: "First in time, first in right." Respondents argued that they had prescriptive rights against petitioner by virtue of the overdraft alone. The District Court of Appeal said no. The District Court of Appeal invoked the decisions of the state Supreme Court holding that respondents could not acquire prescriptive rights to take petitioner's water without having adversely taken the water for five years with petitioner's knowledge; also, that adverse user implied involuntary diminution of petitioner's water supply as a result of the production of the other parties to the action. The District Court of Appeal held that inasmuch as the record showed petitioner had taken all the water it cared to use in increasing amounts during the five year period, respondents had not invaded petitioner's usufructuary right, and inasmuch as there was no finding that

petitioner had knowledge of the overdraft, respondents acquired no prescriptive rights against petitioner. It was pointed out by the District Court of Appeal that the state law was too well settled to be changed by the courts, and if it were changed by the Legislature retroactively that would violate the Constitution of the United States. (79 A. C. A. 593-595, 616.)

Respondents made the same argument in the Supreme Court of California that they had urged upon the District Court of Appeal.

The state law was too well settled for the Supreme Court of California to gainsay that prescriptive rights could not be acquired without the actual invasion of petitioner's usufructuary right and notice of such invasion. But five Justices of that Court apparently concluded that petitioner should not be permitted further "to embarrass the court in the proper determination of the case in view of a larger public interest involved and for the protection of all concerned." (*Peabody v. City of Vallejo, supra,* cited in the opinion in the instant case.) The five Justices undertook to achieve this result and yet do lip service to existing law by the following reasoning, or rather rationalization:

1. An overdraft in the Raymond Basin Area threatened, or might thereafter threaten, to diminish the water necessary fully to supply all the operators in the entire area.

2. All water users in the entire area contributed to the overdraft, and by doing so had acted adversely against all other water users.

3. The lowering of the water in petitioner's wells gave it notice of the lowering of the water table in the entire area, and this in turn gave petitioner notice of the overdraft.

4. Thus the element of notice was supplied against petitioner; hence, the operators in the area all acquired prescriptive rights against each other, including petitioner.

5. Therefore, the use of water should be reduced to the safe yield by applying the formula of ratable reduction set forth in the stipulation to which petitioner was not a party. (See 33 A. C. 911-912.)

It is submitted that the five Justice might as well have said, "We are supreme in California and our fiat is law."

The opinion of the five Justices flies in the face not only of fundamental law but the facts of nature.

To begin with, the opinion is based on the false and arbitrary assumption that every user of underground water at all times during the five year prescriptive period is chargeable with knowledge of future rainfall, as well as the other data developed by the Division of Water Resources during the four and one-half years after the expiration of the prescriptive period.

A short answer to this false and arbitrary assumption is found in the dissenting opinion of Carter, J. (who, prior to his appointment to the California Supreme Court, was one of the leading water lawyers of the State):

> "The majority charge the various appropriators with such knowledge because the water level in the wells was lowered. This is absurd. The level in these wells was, due to the very nature of the source of supply, subject to change. The duration and severity of the winter season, the length and intensity of the rainy season, the humidity or lack of humidity with its attendant lack of evaporation or evaporation would all have an effect on the supply of water available in the wells." (33 A. C. p. 928.)

Significant here is the paper of Mr. Conkling (Deputy State Engineer, who wrote the findings in the Referee's Report) read before a learned society a year prior to the commencement of the present action, in which he stated that an overdraft was not indicated in the San Gabriel Area, which includes the Raymond Basin; also the statement in the standard text of Professor Tolman: "It must not be concluded that a considerable lowering of the water table is serious or detrimental to the water supply." (Pet. for Cert., "Summary, etc.," par. 20.)

Instructive also is the following from the opinion of Shinn, P. J., in the District Court of Appeal:

> "There was no evidence and no finding that appellant [petitioner] had knowledge of the existence of the overdraft. But if appellant had possessed such knowledge it would not have made a different case. The earlier appropriator would have continued his withdrawals in the exercise of his prior right. The later appropriator would have been presumed to be continuing his withdrawals with the knowledge that he would be the first to suffer when the demand exceeded the supply. Under what theory could it be said that priorities were being invaded? There may have been an intention to respect them, but if not there still would have been no invasion. Adverse use consists of acts, not merely of undisclosed intentions." (79 A. C. A., at 616.)

It is not disputed in the opinion of the California Supreme Court that there could be no adverse user against an owner of a water right unless he was aware that his right was being invaded. But notice that their rights were being invaded is declared to exist in the fact that each owner could observe that the water level

in his well had been lowering over a period of years. We say "period of years" because the report shows that during certain years, notably 1934 and thereafter, the water level had been rising rather than lowering. [Resp. Ex. 1, 33 A. C. 904.]

During the wet years of 1934 and 1935, how could an appropriator determine the duration of the water cycle, or determine whether at the end of the cycle water tables would be low or high?

From the opinion of the Supreme Court of California, we must conclude that each owner was supposed to know that there was an underground catch basin with a bedrock of a depth from 200 feet to 1,000 feet, partly within the watershed of the Los Angeles River and partly within the watershed of the San Gabriel River, with a semi-impervious dike at the lower end which confined and dammed-up the percolating water behind it; that each owner within those watersheds, observing that the water level in his wells was falling must know which other wells were in the same subterranean basin and that the water levels in the other wells of the same basin were sinking and that the combined production of the wells would eventually exhaust any surplus supply and reduce the output of the wells in the lowest portion of the basin to the annual intake of the reservoir; that each owner should not only know this but should be aware that the danger point for him had been reached, that his supply would later fail and that he must go into court to protect his superior right by injunctive relief, regardless of whether his presently available supply continues adequate to meet all his rights and requirements. In short, the owner must be held to know that his prior appropriative, or overlying right, is being invaded, because he is supposed to antici-

pate all of the findings and conclusions of this "referee," who has thereafter reported after over four years of extensive investigation, costing over $50,000. Not only this, in order to set the prescriptive process in operation, the owner must realize that the lowering of the water table in the basin as a whole is not to his advantage but is a danger, although the leading authority on ground water, as just stated, says: "It must not be concluded that a considerable lowering of the water table is serious or is detrimental to the water supply."

Unless we can assume all these things, there can be no rights of prescription under the very rules announced by the Supreme Court because there is not the necessary hostility and notoriety.

Moreover, the facts which the Court assumed in order to support its finding as to notoriety and hostility are not only unsupported by the evidence, but affirmative evidence to the contrary appears in the Report, as well as in the testimony.

For example: The Report of the Referee, Exhibit 1, page 116, states:

> "The amount of outflow and wasteful consumption from the ground water depends upon the elevation of the water table. It has been shown that extraction by pumping results in a lowering of the water table and a reduction in the outflow and wasteful consumption. Conversely, the safe yield depends upon the average elevation of the water table chosen as the condition which should be maintained. If it is desired to maintain a high water table, the outflow and waste will be greater and the safe yield will be less. If practical considerations permit that the average elevation of the water table be lower, the safe yield will be greater."

The report further shows a diversion of water by petitioner since prior to 1911; it shows that there has been a continuous use of the water by petitioner since that date; this use is clearly prior and superior to the appropriations of plaintiff and of many others. The report shows that the various well users have been pumping water from the basin for at least twenty years in substantially the quantities shown at the time of the trial. The evidence shows that petitioner increased the amount of its pumping after the action was commenced up to over 800 acre feet annually and that the water level was continuously rising. There is no showing in the record that during the period of the litigation, beginning in 1937 and ending in 1944, any well went dry or that any operator had been deprived of his water to any extent whatever. This clearly demonstrates that, if there was in fact any overdraft in the area, the overdraft was due to the fact that the ground water was maintained at too high a level and that the ground supply would be and was substantially increased by reason of the fact that immediately prior to the suit it had been at a lower level.

And more conclusive than anything as to any prescriptive right claimed against petitioner is the location of petitioner's wells in the lower end of the basin and next to the semi-impervious dike, clearly shown in the report. These wells are "in the southeastern part of this unit" (*i. e.*, the Western unit). The southeastern part is the deepest part of the reservoir and the ground slope is from the mountains on the north and northwest. So by the force of gravity, water settling in the basin from precipitation from the skies, from tributary mountain flows or from seepage from the mountains at the north and northwest will eventually find its way to the Raymond Fault or dike. If the water table there is too high it will become

wasted and lost through the dike. If the water table is sufficiently reduced, it will be retarded at the dike and saved for beneficial use, thereby increasing the safe yield. Therefore, under either circumstances, wells of other parties to the action in the higher areas may go dry while petitioner's wells will continue to be supplied by reason of the greater depth of the reservoir in that area. Moreover, the water table itself, composed of slowly moving percolating water, will have a general, if uneven slope, to the lower southeastern section of the basin. Thus it follows that production from the upper wells can never threaten the priorities of the lower wells.

In considering the doctrine of prescription which it announces, the opinion of the Supreme Court attempts to distinguish it from a prescriptive right along a stream. Admitting that adverse possession cannot run against the upper appropriator in a stream because water has already run past the upper user when diverted by the lower user, the Court compares the basin to a lake, which through continued diversion will eventually be exhausted. But the reasoning of the Court fails to take into account that this basin is not a lake, but a reservoir with water surface and bottom not level, but sloping all one way, and that the supply is not from a steady stream or streams but from many sources, mainly from the sky, and that "the principal ground water movement is from north and west of Monk Hill to the south and east and across Raymond Fault." (33 A. C. 904.) Thus, the situation here is the reverse of a situation in a stream, the appropriator at the lower level is protected by his location; water which he diverts is replenished by gravity, forcing the percolating water along the bedrock to be dammed and accumulated by the dike.

However the situation might have been with other operators less favorably situated, petitioner's water supply having remained at all times, and still being, adequate to all its rights and requirements and with every reasonable prospect of its remaining so, it was both its right, under the provisions of Article XIV, Section 3 of the California Constitution, to see that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable," and also its duty to permit neighboring operators to do the same, particularly if such action would react to the benefit of all. It was not, therefore, at any time upon notice, or under obligation, to do anything about the subsequent extractions by plaintiff or others.

Until the instant decision, there has been no such thing known to the law as "mutual prescription."

Title by prescription cannot be acquired by the exercise of a lawful right or priority, such as that asserted and maintained by the plaintiff, City of Pasadena, but only by a wrongdoer, and then only as against one having a lawful right or priority superior to that of the wrongdoer. The lawful owner must be shown by the trespasser to have been excluded from his property to the extent claimed by the trespasser, or deprived of the enjoyment of the exercise of his right to that extent. Where the trespass is upon a common supply or pool, and not upon any particular owner, then it is obvious that only the weakest right would fall, thus still rendering necessary the determination of the respective rights and priorities.

Carter, J., dissenting, conclusively shows that the decision of the Supreme Court of California changed existing law. (33 A. C. 928-930.)

The decisions of the Supreme Court of California prior to the instant decision demonstrate that under the

pre-existing law there were no rights of prescription against petitioner, and petitioner had no cause of action against the other parties to the action.

In *Lakeside Ditch Co. v. Crane* (1889), 80 Cal. 181, it is said:

> "Title by prescription is created in such cases only where the conduct of the party who submits to the use by another cannot be accounted for on any other hypothesis than that which raises the presumption of the grant of an easement." (Pp. 183-184.)

In *Anaheim Water Co. v. Semi-Tropic Water Co.* (1883), 64 Cal. 185, it is said:

> "With respect to the estoppel relied on by the plaintiffs it is sufficient to say that, as the findings of the court below show that there was sufficient water flowing in the river in 1857 and for nearly twenty years thereafter to supply the wants and demands of the owners of each of the ranches bordering on the stream, the owners of the Santiago Rancho were neither called upon to object to the diversion and appropriation by the predecessors of the plaintiffs, nor had they any right to object thereto. No right of theirs was interfered with." (Pp. 194-195.)

In *Stevinson v. San Joaquin etc. Co.* (1912), 162 Cal. 141, it is said:

> "The only notice that plaintiff could possibly have, therefore, was by observing the fall of the river as it passed his own lands 50 miles below. When the river was running high in May and June such an increased diversion would not be noticeable; but as the water began to fall in July and August it would be observ-

able. In August it would become apparent and it was upon the 12th of August that plaintiff commenced his action. Even when he noticed, or was chargeable with notice of the diminution of the ordinary supply, there is yet to be considered the fact that the flow of the stream naturally varies, not only from month to month and season to season, but also from year to year, so that in a given month of one year there may be much more water in the stream than in the same month of a succeeding or preceding year owing to the time, nature and extent of the rainfalls, the quantity of snow in the mountains and the weather conditions there which may retain the snow, permitting it to melt slowly or may cause it to melt rapidly with a consequent sudden and high run-off. Moreover, it is disclosed that in the fifty miles between plaintiff's land and defendant's canal there were others drawing from the stream, and it was for the plaintiff to determine by investigation to which of these the shortage was attributable before he could commence his action." (Pp. 145-146.)

In *Pabst v. Finmand* (1922), 190 Cal. 124, the Supreme Court of California said:

"In the absence of a showing that the upper owner is using the water under a claim of prescriptive right the lower owner has the right to presume that such owner is only taking that to which he is entitled as a riparian owner by virtue of his riparian right. (Citing cases.) Such use was not hostile unless there was an actual clash between the rights of the respective owners. While there was sufficient water flow-

ing down the stream to supply the wants of all parties, its use by one was not an invasion of the rights of the other. (Citing cases.)" (Pp. 128-129.)

In *City of San Diego v. Cuyamaca Water Co.* (1930), 209 Cal. 105, the Supreme Court of California said:

" 'In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party. This is thoroughly settled. Now it is very clear that while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and *as the court found, as a fact, that until within a year or two prior to the commencement of the action, there was sufficient water flowing in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs as against the owners of the Santiago Rancho have acquired no right by prescription.*' The next case to which we would refer is that of *Faulkner v. Rondoni,* 104 Cal. 147 [37 Pac. 883], wherein (without stating the facts of the case) we find that the doctrine above announced was expressly approved, the trial court having found that during the period claimed to have given rise to the prescription there had been sufficient water in the stream for the uses of all of the parties to the action and that, therefore, there had been no such invasion of the rights of one which could form the basis of a prescriptive right in the other. In the quite recent case of *Pabst v. Fin-*

mand, 190 Cal. 128 [211 Pac. 11, 13], the doctrine above quoted from *Anaheim Water Co. et al. v. Semi-Tropic Water Co., supra,* was again approved, the court saying that the use by the adverse claimant 'was not hostile unless there was an actual clash between the rights of the respective owners. While there was sufficient water flowing down the stream to supply the wants of all parties, its use by one was not an invasion of the rights of the other.' * * *" (Pp. 133-134.)

The evidence shows that the lowering of the water level in petitioner's wells was due to its deliberate act, and that act was for the purpose of rendering petitioner's water logged land available for habitation. [Rep. Tr. pp. 767-771.] Yet the only fact of which the Supreme Court of California asserts petitioner had actual knowledge is the fact of the lowering of the level of the water in its own wells.

It has been conclusively shown, we submit, that if knowledge of the lowering of the level of the water in its own wells put petitioner on inquiry, and such knowledge should have led to the discovery of the lowering of the water table generally in the area, the fact discovered was equivocal and would not have shown that there was an overdraft in the area. The element of notice necessary to prescription is therefore absent, and we have also shown that the necessary element of adverse user is likewise absent. It is plain, therefore, that the instant pronouncement of the Supreme Court of California is its fiat, and that alone.

Conclusion.

The disregard of procedural due process is far more aggravated than that condemned in *Morgan v. U. S., supra,* and *Ohio Bell Telephone Company v. Public Utilities Commission, supra.*

The situation here is closely parallel to that in *Brinkerhoff-Faris etc. Co. v. Hill, supra.* There, under the statute as previously construed, appellant had no right to appear before the Tax Commissioners, and hence the later case holding that it lost its rights because it did not so appear was held by this Court to be violative of due process because when the later case was decided the statutory period had elapsed. Here, under pre-existing law, petitioner had no constructive knowledge of the overdraft, and if it had such knowledge it would have had no cause of action by reason of the overdraft. Therefore, the decision in the instant case, taking away petitioner's water and giving it to the parties to the stipulation because petitioner did not bring an action under pre-existing law, deprived petitioner of property without due process of law.

It is submitted that the Writ of Certiorari should issue as prayed.

Respectfully submitted,

JOSEPH L. LEWINSON,
RICHARD C. GOODSPEED,
Attorneys for Petitioner.

SUBJECT INDEX

PAGE

Introduction 1

I.

The opinion of this court in Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. Ed. 1084, is an effective answer to petitioner's contention, under its Point I, that the judgment of the Supreme Court of California herein deprived petitioner of due process 5

Cases cited by petitioner 12

II.

The legal questions presented by petitioner under its Point II are not federal questions but are questions of state or general law 18

Conclusion 27

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bray v. Superior Court, 92 Cal. App. 428, 268 Pac. 374	5, 17
California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 79 L. Ed. 1356	18
Carter v. Kubler, 320 U. S. 243, 88 L. Ed. 26	12, 14
Connecticut v. Massachusetts, 282 U. S. 660, 75 L. Ed. 602	18
Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598	12
Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720	18, 19
Devine v. Los Angeles, 202 U. S. 313, 50 L. Ed. 1046	18, 19
Fervel v. Fervel, 23 Cal. 2d 431, 144 P. 2d 592	15
Fleming v. Bennett, 18 Cal. 2d 518, 116 P. 2d 442	5, 15
Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487	11, 18, 21
Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748	23
Humboldt Land & Cattle Co. v. Allen, 14 F. 2d 650	17
Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956	18
Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766	21
Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369	22
Los Angeles F. & M. Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736	18
Miller & Lux v. Enterprise Canal etc. Co., 169 Cal. 415, 147 Pac. 567	24
Morgan v. United States, 298 U. S. 469, 80 L. Ed. 1288, 304 U. S. 1, 82 L. Ed. 1129	12, 13
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093	12, 14, 21, 22
O'Neil v. Northern Colorado Irrigation Co., 242 U. S. 20, 61 L. Ed. 123	25
Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. Ed. 1084	5, 8

PAGE

Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 5
Peoples Gas Co. v. Tyner, 131 Ind. 277 21
Peterson, Walter, In the Matter of, 253 U. S. 300, 64 L. Ed. 919 12
Powhatton Min. Co. v. Ickes, 118 F. 2d 105 12
Railroad Commission v. Rowan et al., 310 U. S. 573, 84 L. Ed. 1368 22
Snake Creek etc. Co. v. Midway, 260 U. S. 596, 67 L. Ed. 423 ..... 18, 20
Telluride v. Rio Grande etc. Co., 187 U. S. 569, 47 L. Ed. 307 ..... 18, 20
United States v. Dillman, 146 F. 2d 572 ..... 12, 15
United States v. Los Angeles and Salt Lake Railway Co., 273 U. S. 299, 71 L. Ed. 651 12
United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136 18
Western Union Tel. Co. v. Industrial Com., 24 Fed. Supp. 370 12
Weyerhauser v. Minnesota, 176 U. S. 550, 44 L. Ed. 583 ..... 18, 20
Wood v. Pendola, 1 Cal. 2d 435, 35 P. 2d 526 5

TEXTBOOKS

16 Corpus Juris Secundum, Sec. 128, p. 331 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 353

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introduction.

The complaint in the present action was filed on September 23, 1937, for the purpose of quieting the title of

plaintiff as against the defendants to divert and use the underground waters in the Raymond Basin Area, and to enjoin each defendant found to own a right to divert water in said basin from taking therefrom in any year water in such volume as, when added to the amount which the other parties should be decreed to be entitled to take, would result in a total annual diversion from said basin in excess of the average annual supply of water thereto.

On February 8, 1939, the Court referred the case to the Division of Water Resources, as referee, for investigation and report upon all of the physical facts involved in the action, under authority contained in Section 24 of the Water Commission Act. [Ex. 1, pp. xxi-xxiii.] On June 21, 1939, the Division filed a preliminary report recommending bringing in additional parties, and on July 13, 1939, the Court issued its order directing that certain additional parties be brought into this action. On June 9, 1939, the Court made its order and instructions to referee wherein it found and ordered "that the issues in the above entitled cause embrace an adjudication of the rights of the defendants *inter se* and the rights of each and every party as against each and every other party." [Ex. 1, pp. xxiv, xxv.]

Regarding the use of engineering data of parties in the instant case, it is noteworthy that the trial court in ordering the reference herein included the following [Ex. 1, p. xxiii]:

> "It is recommended to the parties to this action, that they, severally or jointly, appoint engineers to collaborate with the Division of Water Resources throughout this investigation, and it is recommended to the referee that it seek the advice and counsel of said engineers in the formulation of the program of investigation and in the preparation of the report."

Acting on that recommendation certain of the parties appointed engineering representatives who aided the referee in the preparation of the report. The engineers so acting and the enterprises represented by them are as follows [Tr. pp. 671-672; Ex. 1, p. xxiv]:

"EDWARD R. BOWEN	City of Alhambra
	California Water and Telephone Company
JOHN W. CLAY	City of Alhambra
RAYMOND A. HILL	Flintridge Mutual Water Company
J. Q. JEWETT	Las Flores Water Company
	Lincoln Avenue Water Company
	Rubio Canon Land and Water Association
	Valley Water Company
J. D. MACKERRAS	First Trust and Savings Bank of Pasadena (Altadena Golf Club)
SAMUEL B. MORRIS assisted by MORRIS S. JONES CLAUDE W. SOPP	City of Pasadena
F. A. OLSEN	Sunny Slope Water Company
H. A. PETRIE	San Gabriel County Water District
RALPH SHOEMAKER	City of Arcadia
	City of Sierra Madre
FRANKLIN THOMAS	Robert A. Millikan, *et al.*, Trustees of the Henry E. Huntington Library and Art Gallery"

The referee's report, therefore, is not only the result of investigation and study by a specially trained state division, but also it has had the benefit of the cooperative efforts of the engineers of many of the parties.

Petitioner not only refrained from appointing an engineer as recommended in the order, but also refused to furnish necessary records to the referee. On August 30, 1939, in response to a request therefor by the referee, the court issued an order that petitioner submit and make available to the referee all documentary evidence in its possession bearing upon the issues referred to the referee. [Ex. 1, p. xxxvi.]

On October 14, 1941, the referee transmitted copies of its proposed draft of report as referee to the attorneys of record in this action. On March 15, 1943, the referee formally served its Draft of Report of Referee upon all parties. Objections to the Draft of Report were filed by some of the parties, including the petitioner, who filed *60* specific objections. [Tr. pp. 457-469.] The referee made minor changes in the report pursuant to certain of the objections.

The Report of the Referee was filed in court on July 12, 1943. The Court set May 18, 1944, for the hearing of exceptions to the Report of Referee and the further trial of the case. Although a number of parties filed exceptions to the Report, all of such exceptions were withdrawn at the beginning of the hearing on May 18, 1944, with the exception of those filed by petitioner. There were twelve days of trial in the period May-August, 1944. [Tr. p. 419, fol. 891.] The reporter's transcript of the trial contains *1228* pages, all of which are devoted to the presentation by petitioner of its exceptions (*60* in number) and evidence in connection therewith. We emphasize the point that the entire trial involved the consideration of those exceptions only which were filed by petitioner. The trial was solely for its benefit.

I.

The Opinion of This Court in Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. Ed. 1084, Is an Effective Answer to Petitioner's Contention, Under Its Point I, That the Judgment of the Supreme Court of California Herein Deprived Petitioner of Due Process.

The statutes of the State of California provide two procedures for the adjudication of the relative rights to the water of a common source of supply. In point of time, they are first, the statutory procedure, and second, the reference procedure. The latter is the procedure involved herein.

The statutory procedure in California is the same as that provided in the 1909 Water Code of Oregon, the validity of which was upheld by this Court in *Pacific Live Stock Co. v. Lewis,* 241 U. S. 440, 60 L. Ed. 1084. The constitutionality of this procedure has been upheld by the California courts in *Bray v. Superior Court,* 92 Cal. App. 428, 268 Pac. 374, and *Wood v. Pendola,* 1 Cal. 2d 435, 35 P. 2d 526.

In the *Bray* case the court noted and discussed the similarity of the statutory procedure adopted by California to that of Oregon, involved in the *Pacific Live Stock Co.* case, *supra,* and of other western states.

The constitutionality of the reference procedure has been upheld by the California Supreme Court in *Fleming v. Bennett,* 18 Cal. 2d 518, 116 P. 2d 442, and in the instant case, *Pasadena v. Alhambra,* 33 Cal. 2d 908, 207 P. 2d 17. In opening its opinion in the instant case, the Court said (33 Cal. 2d 916):

"Plaintiff city, the chief producer of water from a 40 square mile alluvial-filled basin of ground water

known as the Raymond Basin Area, instituted this litigation to determine the ground water rights within the area and to enjoin an alleged annual overdraft in order to prevent eventual depletion of the supply. Pursuant to section 24 of the Water Commission Act, which was then in force (Stats. 1913, p. 1012, as amended, Deering's Gen. Laws (1937), Act. 9091; now Wat. Code, §§2000-2050), the trial court referred the matter to the Division of Water Resources of the Department of Public Works for a determination of the facts, and the ensuing report of the division was received in evidence. On the basis of this report all of the nondisclaiming parties, with the exception of the defendant California-Michigan Land and Water Company, a public utility and the sole appellant herein, entered into a stipulation for a judgment allocating the water and restricting total production to the safe annual yield. The court, after hearing evidence presented by appellant in opposition to the report, rendered a judgment substantially enforcing the terms of the stipulation against all parties, including appellant.

"The principal issues presented on this appeal are whether the trial court properly limited the amount of water that appellant may take from the ground in the Raymond Basin Area, and whether it erred in placing the burden of curtailing the overdraft proportionately on all parties. * * *"

Regarding the approval of the reference procedure by the California Supreme Court, it is said in the instant case (33 Cal. 2d. 917, 918):

"Every recent major water law decision of this court has expressly or impliedly approved the reference procedure provided by section 24 and has recommended, in view of the complexity of the factual is-

sues in water cases and the great public interests involved, that the trial courts seek the aid of the expert advice and assistance provided for in that section. (See *Fleming v. Bennett,* 18 Cal. 2d 518, 522 *et seq.* (116 P. 2d 442); *Meridian, Ltd. v. San Francisco,* 13 Cal. 2d 424, 457 (90 P. 2d 537, 91 P. 2d 105); *Rancho Santa Margarita v. Vail,* 11 Cal. 2d 501, 558-559 (81 P. 2d 533); *City of Lodi v. East Bay Mun. Utility Dist.,* 7 Cal. 2d 316, 341 (60 P. 2d 439); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.,* 3 Cal. 2d 489, 575 (45 P. 2d 972, 1014); *Peabody v. City of Vallejo,* 2 Cal. 2d 351, 373-374 (40 P. 2d 486); *Wood v. Pendola,* 1 Cal. 2d 435, 443 (35 P. 2d 526).)

"In sustaining and approving the reference procedure, it was stated in the Fleming case that 'all of the pertinent constitutional safeguards were observed by the legislature in enacting the provisions of section 24. . . .' (18 Cal. 2d at p. 528.) The opinion did not mention whether section 24 conflicted with article III, section 1, of the Constitution, which provides for the separation of powers, or discuss whether such an order of reference invalidly subjects an executive branch or division and its officers to the control of the judiciary. It was, however, expressly held (18 Cal. 2d at pp. 523-525) that section 24 does not provide for the exercise of judicial power by the division, and implicit in the decision is the conclusion that the separation of governmental powers is observed. (See, also, *Wood v. Pendola,* 1 Cal. 2d 435, 442 (35 P. 2d 526).) In effect section 24 provides that the court may appoint the division to act as an investigator and an expert witness, but there is nothing which authorizes the courts to control or regulate, in any particular, the proper functions of the division or the manner in which, pursuant to legislative mandate, it shall proceed in conducting its ex-

amination and making its report. The Fleming case also expressly held that section 24 is not unconstitutional and void as a special law providing for a variation from the general practice and procedure in the superior court in violation of article IV, section 25, of the Constitution. (18 Cal. 2d at p. 528, cf., Wood v. Pendola, 1 Cal. 2d 435, 442 (35 P. 2d 526).)"

In both its petition and brief, petitioner seems to indicate that the only evidence before the trial court when it acted in this case was the report of the referee and the stipulation for judgment executed by plaintiff and all defendants other than petitioner. It ignores completely the many days of trial given to petitioner (then defendant) by the court in hearing its exceptions to the referee's report. At page 66 of its petition and brief herein, petitioner argues:

". . . In *Fleming v. Bennett* it was held that the Legislature was authorized to permit the filing of the report of a Referee made solely on the basis of private investigation, and to give the report of the Referee the status of *prima facie* evidence, and this on the authority of *Pacific Live Stock Company v. Lewis* (1916), 241 U. S. 440, although the Oregon statute involved in that case required a full and fair hearing, and the report of the Referee was made only after a full and fair hearing in which witnesses were sworn and examined and a record of all the evidence was preserved."

Petitioner clearly misunderstands the character of the report of the State Water Board in the *Pacific Live Stock Co.* case. It also fails to note that appellant in that case entered the same objections to the procedure before the Board that petitioner does here to the referee's report. This

is shown by the following excerpts from the opinion in that case (241 U. S. 451, 60 L. Ed. 1097, 1098):

"As an alternative to its first contention, which we hold untenable, the plaintiff insists that the statute is repugnant to the due process of law clause of the 14th Amendment, first, because it requires a claimant, at his own expense, to assert and prove his claim before the board, and to pay an extortionate fee for having it considered,—all under penalty of forfeiting his claim if he refuses,—notwithstanding the board acts only administratively and its findings and order are not conclusive; second, because it permits the board to accept and act upon the sworn statement of claimants taken *ex parte* and upon the data set forth in the unsworn report of the engineer, without, as is asserted, affording any opportunity for showing their true value, or the want of it, by cross-examination or otherwise; and, third, because it requires that the board's findings and order, although only administrative in character, be followed and given effect in the distribution of the water pending the action of the circuit court upon them.

"A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board, and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence, and making an advisory report, the board merely paves the way for an adjudication by the court of all the rights involved. As the supreme court of the state has said, the Board's duties are much like those of a referee. (And see Washington *ex rel.* Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 526, 527, 56 L. ed. 863, 868, 869, 32 Sup.

Ct. Rep. 535.) All the evidence laid before it goes before the court, where it is to be accorded its proper weight and value. That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable.

* * * * * * * *

". . . And while it is true, according to the concessions at the bar, that the sworn statements of claim are taken *ex parte* in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them, and that, upon the hearing of the contests, full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken *ex parte* becomes of no moment. And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examination shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all, and is accepted as *prima facie* evidence, but not as conclusive. . . ."

It is noteworthy that the following sentence is used in the first of the above-quoted excerpts:

"As the supreme court of the state has said, the board's duties are much like those of a referee."

Unlike the statutory procedure, there is nothing novel in the referee procedure. In 16 Corpus Juris Secundum Constitutional Law, §128, p. 331, it is said:

> *"Regulating references.* Legislation providing for the trial of causes by auditors and referees and making their findings evidence, without concluding the parties thereby, is within the power of the legislature; but legislation making the findings of such officers conclusive is ordinarily an invasion of the province of the judiciary and unconstitutional, although where the constitution sanctions regulation of the jurisdiction of a court, or the matter is peculiarly one for the legislature, a statute may provide for reference to officials having the same power of determination as the court. . . ."

The following is from a footnote (p. 331):

> *"Reason for rule*
>
> "In such cases there is no interference with the judicial power, since the subordinate officers act under the direction of the courts, which may review and reverse the findings of such officers.—*Janesville Cotton Mfg. Co. v. Ford,* 12 N. W. 377, 55 Wis. 197—12 C. J. p. 828, note 21."

In one of the early cases dealing with the pueblo right of Los Angeles, *Hooker v. Los Angeles,* 188 U. S. 314, 318, 47 L. Ed. 487, it is said:

> "The 14th Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."

The power of a court to refer disputed issues in a case to an auditor or referee with power to make findings with respect thereto where such findings are not given conclusive but only *prima facie* effect and the parties are given the opportunity of having their objections thereto heard and considered by the court cannot be doubted. Such practice was approved by this court in the case of *In the Matter of Walter Peterson,* 253 U. S. 300, 64 L. Ed. 919.

Statutes providing for the determination of factual matters by administrative agencies where judicial review thereof is provided do not violate due process.

Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598;

United States v. Los Angeles and Salt Lake Railway Co., 273 U. S. 299, 71 L. Ed. 651.

CASES CITED BY PETITIONER.

The following cases are cited by petitioner in support of its contention that the judgment herein deprived petitioner of due process:

(1, 2) *Morgan v. United States* (1936), 298 U. S. 469, 80 L. Ed. 1288; (1937), 304 U. S. 1, 82 L. Ed. 1129;

(3) *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. Ed. 1093;

(4) *Carter v. Kubier,* 320 U. S. 243, 88 L. Ed. 26;

(5) *United States v. Dillman,* 146 F. 2d 572;

(6) *Powhatton Min. Co. v. Ickes,* 118 F. 2d 105;

(7) *Western Union Tel. Co. v. Industrial Com.,* 24 Fed. Supp. 370.

The first *Morgan* case dealt with a rate order of the Secretary of Agriculture under Packers and Stockyard

Act. The full hearing required by the statute was not given. The Court said (p. 477):

> ". . . If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied. . . ."

The Court further said (p. 478) that it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented, although it could not say that that particular type of procedure was essential to the validity of the hearing.

It must be emphasized that in the instant case a copy of the referee's report was given to each of the parties, including petitioner and pursuant to statute each party was given a fixed time to file objections thereto. Petitioner filed 60 objections to the referee's report and had a full judicial hearing thereon.

In the second *Morgan* case, 304 U. S. 1, 82 L. Ed. 1129, no opportunity had been afforded appellants for the examination of the findings, prepared by the Bureau of Animal Industry, until they were served with the order. This Court was so impressed by the absence of due process in this second *Morgan* case that it said (pp. 19, 20):

> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements

of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The *Ohio Bell Tel. Co.* case, 301 U. S. 292, 81 L. Ed. 1093, is sufficiently explained by the tenth headnote as follows:

"10. Where the findings of a state Utilities Commission in a proceeding to determine the reasonableness of rates as to the value of the property of a telephone company at the periods in question are not supported by evidence, the court has no occasion to determine the propriety of the method of allocation followed in ordering a refund of rates collected in excess of those held reasonable, or of the commission's treatment of going concern value and depreciation reserve."

In *Carter v. Kubler,* 320 U. S. 243, in fixing the valuation of a farm in a proceeding under the farmer-debtor provisions of the Bankruptcy Act, the Commissioner based

his conclusion as to value on his own personal investigation. There was no opportunity given to combat the personal views of the Commissioner thus obtained.

In *U. S. v. Dillman,* 146 F. 2d 572, dealing with the value of land condemned by the Government, the trial judge viewed the land and was given information by a police sergeant. Neither the thoughts of the trial judge nor the information given to him by the police sergeant appeared in the record and, therefore, could not be combatted.

In *Fervel v. Fervel,* 23 Cal. 2d 431, 144 P. 2d 592, it was held that it is not the province of investigators to make a private factual report or recommendation to the judge, or any recommendation independent of the evidence upon which it is based.

It is clear from the above comments upon the cases cited by petitioner that no one of them presents procedural facts at all similar to those involved herein. We have elsewhere stated the number of objections filed by the present petitioner to the report of the referee and the number of exceptions to such report filed in and heard by the trial court. The procedure of the instant case in its liberality in affording opportunity to present objections and exceptions, and evidence and arguments thereon, is in marked contrast with the total absence of such opportunity presented in the cases relied upon by petitioner. On this point the words of the California Supreme Court in *Fleming v. Bennett,* 18 Cal. 2d 518, 527 (the first California case up-

holding the constitutionality of the reference procedure) are appropriate:

> ". . . (4a) The appellants do not question the power of the legislature to prescribe that the report of the referee shall be *prima facie* evidence of the facts reported. Indeed, that power may not be denied. (See *People v. Buckley,* 143 Cal. 375, 393 (77 Pac. 169); *Miller & Lux, Inc., v. Secara,* 193 Cal. 755, 766 (227 Pac. 171); *Pacific Live Stock Co. v. Lewis,* 241 U. S. 440 (36 Sup. Ct. 637, 60 L. Ed. 1084).) The parties were not deprived of any constitutional right. They were afforded full opportunity to be heard in opposition to the report as evidence, and to introduce evidence contrary to the facts appearing therein. Constitutional mandates are observed where such facts are not made incontrovertible and opportunity is given to refute them in court. (*Pacific Live Stock Co. v. Lewis, supra;* see also *Heiner v. Donnan,* 285 U. S. 312 (52 Sup. Ct. 358, 76 L. Ed. 772).) . . ."

Petitioner asserts (Petition p. 34) that the parties did not disclose their claims to petitioner prior to trial, and therefore it was impossible for petitioner to defend against the claims. The record, of course, shows the falsity of this contention. The claims of the various parties were set forth in their pleadings on file. True, the answers of the other defendants were not served upon petitioner, but petitioner could have easily ascertained the nature and extent of the claims by inspecting the pleadings on file. Moreover, long prior to the trial the parties served petitioner with copies of the agreement and judgment which they

sought to have the court make effective as among themselves prior to the time of trial and gave notice to petitioner of the time and place when that application would be made to the court. [Tr. pp. 477-478.] The proposed judgment and agreement set forth fully the concept of these parties as to the nature and character of the basin, the basis upon which the rights of each party should be determined, the amount of the water these parties thought petitioner was entitled to under the facts and law applicable as well as the amount each of the stipulating parties considered he was entitled to. [Tr. pp. 482-506.] Thus, petitioner had full and complete knowledge of the claims of the parties not only with respect to the factual situation, but also with respect to the legal principles they would seek to have applied in the determination of the case.

Due process does not require that pleadings and the claims of the various parties to an adjudication suit be personally served upon each of the other parties. It is sufficient if the nature and extent thereof can be ascertained by the parties from an inspection of the record in the case (*Humboldt Land & Cattle Co. v. Allen,* 14 F. 2d 650). Such was the established law in California at the time of the commencement of the instant action (*Bray v. Superior Court, supra*).

II.

The Legal Questions Presented by Petitioner Under Its Point II Are Not Federal Questions but Are Questions of State or General Law.

Questions of state or general law are not federal questions.

United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136;

Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956;

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 79 L. Ed. 1356;

Connecticut v. Mass., 282 U. S. 660, 75 L. Ed. 602;

Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720;

Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487;

Devine v. Los Angeles, 202 U. S. 313, 337, 50 L. Ed. 1046, 1054;

Los Angeles F. & M. Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736;

Telluride v. Rio Grande etc. Co., 187 U. S. 569, 47 L. Ed. 307;

Snake Creek etc. Co. v. Midway, 260 U. S. 596, 67 L. Ed. 423;

Weyerhaueser v. Minn., 176 U. S. 550, 44 L. Ed. 583.

In the first four cases cited above this Court has recognized the right of each state to adopt its own system of water law. This is exemplified by the following excerpt from *Kansas v. Colorado*, 206 U. S. 93, 94:

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this

> case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. * * * It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control."

The four cases cited above in which Los Angeles was defendant in error dealt with the *pueblo right* of that City to the water of Los Angeles River. This pueblo right had come down from the Mexican regime in California and was considered paramount to the riparian rights of upper owners on the river. It was claimed by the riparian owners that treaties with Mexico were involved and that, therefore, a federal question was presented. The rule adopted by this Court in these four cases is concisely stated in the headnote to the opinion in the *Crystal Springs L. & W. Co.* case, 177 U. S. 169, as follows:

> "A suit to establish water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of a treaty with Mexico, is held to involve no Federal question for the purpose of giving jurisdiction to the Federal courts."

In the third of the pueblo-right cases cited above, *Devine v. Los Angeles,* 202 U. S. 313, 337, it is said:

> "In truth, the questions as to the nature and extent of complainants' title or rights, as put forward in the bill, are not Federal questions, but questions of state or general law.
>
> "In *Hooker v. Los Angeles, supra,* it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and

in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States and so reviewable here. But this court held otherwise, and we said:

" 'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco v. Scott,* 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *California Powder Works v. Davis,* 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350. And the question of the existence of percolating water was merely a question of fact. . . ."

In *Telluride P. T. Co. v. Rio Grande W. R. Co.,* 187 U. S. 569, the second headnote is:

"2. Findings of fact or questions of local law upon which depends a party's right, under U. S. Rev. Stat. §2339 (U. S. Comp. Stat. 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on writ of error to a state court."

In *Snake Creek M. & T. Co. v. Midway Irrig. Co.,* 260 U. S. 596, 599, it is said:

"The parties, while agreeing that the Utah law is controlling, differ as to what the law is."

In *Weyerhaueser v. Minn.,* 176 U. S. 550, 559, it is said:

"Besides, whether a party in a case has been given or refused the benefit of the law of estoppel involves no Federal question."

In the cases above considered it is shown that even though the water rights presently involved may have come down from the Mexican government or may have been acquired on public lands, no Federal question was involved. In the instant case the matter of pueblo rights, or riparian rights, or appropriative rights to waters of a stream, are not present. The title to percolating water is alone involved. Until *Katz v. Walkinshaw,* 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1903), the owner of land in California owned the percolating water contained therein. The *Katz* case established the doctrine that the owner of land has a correlative right to use the underlying percolating water with other owners of land similarly situated. The source of the title to percolating waters under either the old or the new doctrine was the ownership of the land. Under the authorities above cited this ownership does not present a Federal question. In the excerpt from *Hooker v. Los Angeles* hereinabove quoted (p. 20) it is stated:

> "Obviously, the question as to the title or right of the plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law upon which the decision of the state court was final."

Cases dealing with oil and gas often speak of the analogy between them and percolating water. In *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 207, 44 L. Ed. 729, this Court in quoting from *Peoples Gas Co. v. Tyner,* 131 Ind. 277, 281, said:

> " 'Water, petroleum, oil and gas are generally classed by themselves as minerals possessing in some degree a kindred nature. * * * Like water it is not the subject of property except while in actual occu-

pancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The opinion in the *Ohio Oil Co.* case closes as follows (177 U. S. 211, 212):

"In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

In *Lindsley v. National Carbonic Gas Co.,* 220 U. S. 61, 81, 55 L. Ed. 369, it is said:

"Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be *prima facie* evidence of another fact."

In *R. R. Com. v. Rowan et al.,* 310 U. S. 573, 580, 581, 84 L. Ed. 1368, dealing with the proration of oil production, it is said:

". . . But such cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the

underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."

It is therefore unnecessary to review the many contentions made by petitioner with respect to the facts or the weight or sufficiency of the evidence to justify the findings of the trial court with respect to the facts, nor to enter into a discussion of the conclusions of the District Court of Appeal in so far as they are contrary to those reached by the trial court and by the Supreme Court.

It is apparently asserted by petitioner that the decision of the California Supreme Court reverses prior decisions of that court with respect to the application of the statute of limitations and the doctrine of notice. Petitioner points to no prior decision of any court of California holding that the lowering of the water table is not notice of a dimunition in the supply of water or that such dimunition in the supply is not notice of an adverse and hostile taking of water from the common supply, nor does petitioner cite any case decided by the California courts holding that the taking of water from a depleted basin is not hostile to the taking of others from the same source. The reason for this failure is apparent as the rule in California ever since the decision in 1909 in the case of *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. 748, has been that a diminution in the amount of water at a party's point of diversion (abundantly evidenced by the substantial and progressive

lowering of the water levels at petitioner's point of diversion) puts that party on notice of the invasion of his right and starts the prescriptive period. There the court stated (p. 631):

> "There is no foundation for the proposition that the statute of limitations would not begin to run in favor of Currier, with respect to his right to maintain wells, until the extraction of water by his wells had begun to diminish the flow at the plaintiff's dam. The evidence shows that the effect was perceptible at the dam immediately and that the plaintiff had knowledge of the flow from the wells and the use thereof by Currier from the beginning. This was sufficient to charge her with notice that the tendency of the diversion of the flow at those wells would be to reduce the amount in the stream below and to start the statute of limitations running."

The law was likewise well settled that two uses made simultaneously from a basin are necessarily inconsistent and antagonistic. In the case of *Miller & Lux v. Enterprise Canal Etc. Co.*, 169 Cal. 415, 147 Pac. 567, the court stated (p. 433) with respect to a basin of water created by a dam:

> ". . . The opening of the headgate at such times would inevitably divert into the canal water that would otherwise pass into the slough. This would be the result alike when water stands at the natural river level, and when it is backed up the slough by the dam. The two uses, if made simultaneously, would necessarily be inconsistent and antagonistic. For these reasons, the finding cannot be true that the natural flow of the water from the river into the slough is not and never has been impeded by the operation of said canal."

The rule, of course, is well settled that before a party can complain that his property is taken without due process of law because of the construction placed upon a state statute of limitations by a state court, he must show that the prior decisions construing the statute were contrary to the construction complained of and the prior decisions had become a rule of property. In the case of *O'Neil v. Northern Colorado Irrigation Co.*, 242 U. S. 20, 26, 27, 61 L. Ed. 123, this court said:

> ". . . The answer to the first half of the plaintiff's contention is no less plain. It is that the construction of a statute does not take a party's property without due process of law simply because it takes him by surprise, and when it is too late for him to act on the construction and save his rights. That is all that the plaintiff has to complain of. There was no different construction of the statute by the court before the limitation had run, that might have lulled him to repose.
>
> * * * * * * * *
>
> "It is suggested that the cases cited established a rule of property, and that any departure from it violated the plaintiff's rights under the 14th Amendment. But we already have said that the cases do not establish the rule supposed, and if they did, something more would be necessary before the plaintiff could come to this court. *Sauer v. New York*, 206 U. S. 536, 547, 548, 51 L. ed. 1176, 1182, 27 Sup. Ct. Rep. 686; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678."

That the case, even under petitioner's view, involves no more than the application of existing statutes to a new situation rather than the overruling of prior decisions applying the statute to the same situation, is apparent from

petitioner's statement on page 81 that "until the instant decision there had been no such thing known to the law as 'mutual prescription.'" Prior decisions had not involved an *inter se* determination of conflicting adverse claims to a common supply in a basin. (33 Cal. 2d p. 931.) Of course, under the cited case, this involves no question of due process.

However, as we have noted, the application of the doctrine of prescription and of notice made by the Supreme Court of the State of California in the instant case is in harmony with and not contrary to its prior decisions, and petitioner has pointed to no prior decision of the California courts sustaining its position. The application of the prior rules well established by the California courts prior to the decision in the instant case and the commencement of this action, together with petitioner's stipulation that the taking of water by each party was under a claim of right which was asserted to be and was adverse to each and all other parties, sufficiently disposes of petitioner's contentions and fully justifies the conclusion of the court as set forth in its opinion (33 Cal. 2d pp. 922, 928-932). As noted by the court the stipulation covered all elements of prescription except the period covered by the adverse user and the nature and extent of the user. It found sufficient evidence to support the trial court's finding with respect to these elements and held that under state law the facts justified the application of the doctrine of notice. Thus no federal question is presented.

Conclusion.

For the reasons herein set forth we respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

A. E. CHANDLER,
Attorney for Respondents.

KENNETH K. WRIGHT,
Of Counsel.

SUBJECT INDEX.

PAGE

Statement 2

Argument 4

Point I. Pacific Love Stock Company v. Lewis (1916), 241 U. S. 440, is not in point, and if it were it would necessarily yield to Morgan v. United States (1936), 298 U. S. 468 (1938), 304 U. S. 1, and Ohio Bell Telephone Co. v. Public Utilities Commission (1937), 231 U. S. 292..... 4

Point II. The Supreme Court of California could not change the law retroactively, and thereby deprive petitioner of its vested water rights without granting petitioner its day in court 8

Conclusion 13

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673	12
Carter v. Kubler, 320 U. S. 243	13
Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748	8, 9
Miller v. Lux Enterprise Canal Etc. Co., 169 Cal. 415, 147 Pac. 567	9, 10
Morgan v. United States, 298 U. S. 468, 304 U. S. 1	7, 13
Ohio Bell Telephone Co. v. Public Utilities Commission, 231 U. S. 292	7, 13
Pacific Live Stock Company v. Lewis, 241 U. S. 440	3, 4, 7, 13
Shelley v. Kraemer, 334 U. S. 1	12

IN THE

Supreme Court of the United States

October Term, 1949.
No. 353.

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

PETITIONER'S REPLY BRIEF.

Statement.

Respondents' brief is silent as to considerations advanced by us, which, in and of themselves, are sufficient to warrant the issuance of the writ; and the arguments made by respondents are not maintainable.

The Petition for Certiorari seeks a review of the judgment of the Supreme Court of California on two grounds.

1. The proceeding in the Superior Court did not meet the requirements of due process, because the judgment of that Court, affirmed by the state Supreme Court, rested solely on the Referee's Report as to the overdraft, the order enlarging the reference to embrace the rights of the parties *inter se,* and the stipulation of the parties other than petitioner for the allocation of water; and (a) the Referee's Report was the result of secret private investigations conducted by the changing personnel of a quasi-public corporation, and not the result of a full and fair public hearing held by a responsible public officer or a board made up of responsible persons; and (b) neither the pleadings, the order enlarging the reference, the Referee's Report, nor the stipulation gave petitioner notice of (and petitioner does not yet know) the nature, character, or particulars of the claims of the respective respondents which have been determined by the state Supreme Court.

2. In order to transfer petitioner's water rights to the other parties to the action, the state Supreme Court changed state law retroactively: (a) the state Supreme Court held that the mere fact of the alleged overdraft

gave petitioner causes of action against the respective other water users in the forty square mile area, and the lowering of the water levels in petitioner's wells gave petitioner constructive notice of its causes of action; hence, by not suing the several respondents within the five year period petitioner lost its water rights; and (b) under the long existing prior law petitioner had no such causes of action, because the overdraft did not constitute adverse user by the several respondents, and the lowering of the water levels was equivocal and gave no notice of the overdraft; consequently, petitioner has been deprived of its water rights without having had its day in court.

In their brief, respondents pass in silence the features of our first point, other than the sufficiency of the Referee's Report. In that behalf they rely on *Pacific Live Stock Company v. Lewis* (1916), 241 U. S. 440. Relative to our second point, respondents content themselves with claiming that the state Supreme Court has not changed the pre-existing law and trying to demonstrate as a general proposition that questions of state or general law are not federal questions.

ARGUMENT.

POINT I.

Pacific Live Stock Company v. Lewis (1916), 241 U. S. 440, Is Not in Point, and If It Were It Would Necessarily Yield to Morgan v. United States (1936), 298 U. S. 468 (1938), 304 U. S. 1, and Ohio Bell Telephone Co. v. Public Utilities Commission (1937), 231 U. S. 292.

In our Brief in Support of the Petition we point out that the *Pacific Live Stock* case was decided under an Oregon statute which required that the Report of the Referee could be made only after a full and fair hearing in which witnesses were sworn and examined and a record of all the evidence was preserved (p. 66).

In the *Pacific Live Stock* case this Court affirmed the judgment of the United States District Court for Oregon, dismissing a suit to enjoin a proceeding before the State Water Board for the determination of the relative rights of the claimants to the water of a stream for irrigation and other beneficial purposes.

The salient features of the Oregon statute authorizing the proceedings before the State Water Board were stated by Mr. Justice Van Devanter as follows:

> "Every material step in the proceeding is to be attended with notice and an opportunity to be heard, the adequacy of which is manifest. In the beginning each claimant is required to present to the division superintendent a *sworn statement of his claim, showing its nature, inception, and extent, and all the par-*

ticulars upon which it is based. * * * Any claimant desiring to contest the claim of another may present to the division superintendent a sworn statement showing the grounds of contest, and *obtain a hearing* before that officer, *at which the parties may present whatever evidence they have, and may secure the attendance of witnesses by compulsory process.* After the evidence in the contests is taken, it and the sworn statements of the several claimants, with the report of the engineer's measurements and observations, are to be laid before the board,—the statements and the report both being regarded as evidence appropriate to be considered. *The board is then to examine all the evidence,* make findings of fact therefrom, enter an order embodying the findings and provisionally determining the relative rights of the several claimants, and *transmit the evidence and a copy of the order to the circuit court of the county wherein the stream or some part of it lies."* (244 U. S., pp. 443-444.) (Emphasis supplied throughout.)

Commenting upon the "sworn statements of the several claimants, with the report of the engineer's measurements and observations," Mr. Justice Van Devanter said:

"And while it is true, according to the concessions at the bar, that the sworn statements of claim are taken *ex parte* in the first instance, it also is true that they are then *opened to public inspection,* that opportunity is given for contesting them, and that, upon the hearing of the contests, *full opportunity is had for the examination of witnesses, including those making the*

statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken *ex parte* becomes of no moment." (244 U. S., p. 453.)

None of the safeguards above referred to was observed in the present proceeding.

(a) While the judgment undertook to establish claims of a prescriptive character against petitioner, no such claims were ever stated in the pleadings, the order enlarging the reference, or the stipulation, and no particulars of any claims were ever given (Petition, pp. 4, 5-6, 10-11).[1]

(b) In the proceedings before the Referee, petitioner was not entitled to have witnesses sworn or to secure the attendance of witnesses by compulsory process, and the Referee's Report was based on private investigations extending over a period of at least three years, without holding any hearing or hearings, or calling or swearing any witnesses. (Our Brief in Support of Petition, p. 49. Petition, pp. 14-19.)

(c) All the data collected by the Referee was not reported to the Court, and a portion of it was not preserved. (Petition, p. 14.)

(d) The Report of the Referee was not made by a board or commissioner that examined "all the evidence and made

---

[1]The allegations in the Petition were not denied, and are supported by the Record, pages 1-442.

findings of fact thereon" but was the work of many hands, and it is impossible to ascertain who did the particular work. (Petition, p. 14.)

(e) At the time of the hearing, many of the craftsmen who contributed to the Referee's Report were deceased, in parts beyond the seas, or otherwise beyond the reach of process. (Petition, pp. 15-16.)

(f) The deputy state engineer who prepared the findings was not familiar with the detail of the evidence (Petition, pp. 17-19); and the State Engineer who signed the Report had no part in the investigation or making the Report. (Petition, p. 15.)

Plainly, *Pacific Live Stock Company v. Lewis* is not in point here.

The very deficiencies in the proceedings before the Referee and the Superior Court, above enumerated, which make the *Pacific Live Stock* case inapplicable here, bring the present case within the rules specifically laid down in the two *Morgan* cases and the *Ohio Bell Telephone* case. (See Brief in Support of Petition, pp. 57-62.)

POINT II.

The Supreme Court of California Could Not Change the Law Retroactively, and Thereby Deprive Petitioner of Its Vested Water Rights Without Granting Petitioner Its Day in Court.

Respondents claim that the decision of the California Supreme Court in the case at bar does not change the pre-existing law. In that behalf they fail to notice the decisions reviewed by Carter, J., in his dissenting opinion [R. pp. 787, 788-790, 794-800, 803-805], the decisions reviewed in the two opinions rendered in the District Court of Appeal [R. pp. 688, 714-716, 720-721, 732-736, 737-738], and the decisions reviewed in our Brief in Support of Petition (pp. 82-85).[2]

Respondents place their reliance upon *Hudson v. Dailey* (1909), 156 Cal. 617, 105 Pac. 748, and *Miller v. Lux*

---

[2]The repugnance of respondents' claims (later adopted by the state Supreme Court) to existing law is clearly shown by Shinn, P. J., in his concurring opinion in the Court of Appeal: "The rights of an appropriator are not invaded by withdrawals of water by others which do not interfere with his present use and give him a right to legal redress. A use which does not amount to such interference is not legally adverse so as to initiate a claim of prescriptive status. The cases so holding are cited in the main opinion. *Respondents contend that a different rule applies to prescriptive claims to percolating water, and that appropriative rights therein are invaded by every use that is made of it when the total uses exceed the average annual supply. This alleged invasion, they claim, renders all uses mutually adverse. It is a novel theory, unsupported by authority and, in my opinion, insupportable in reason.*" [R. p. 732.]

"The theory that withdrawals from a diminishing supply amount to mutual adversity of use as a principle of law is novel, and has been shown to be unsound. It is in irreconcilable conflict with settled principles of the law of prescriptive titles, whether to water rights or other classes of property. It assumes adverse use where

Enterprise Canal Etc. Co. (1915), 169 Cal. 415, 147 Pac. 567.

But those cases are not in point.

In *Hudson v. Dailey, supra,* the plaintiff was actually deprived of her water, and the act which caused it was evident. Defendant Currier sank seven wells in the bed of the creek close to plaintiff's dam, and proceeded to operate them with plaintiff's knowledge for upwards of five years before the filing of plaintiff's suit.

In other words, there was something more than a mere overdraft and the lowering of the level in plaintiff's wells. There was an immediate and obvious lowering of the water in a surface stream. The plaintiff was out of water, and the cause of it was evident. She knew the cause and who was responsible for it, yet she slept on her rights for the statutory period.

---

none exists and would set up prescriptive titles to obliterate vested rights of priority. Priority of right is as sacred as any other type of ownership. It is the rule rather than the exception in our water law. The appropriative system is wholly one of priority. The superior rights of riparian and overlying owners are in reality priorities of right, although not based, as appropriative rights are, upon priority in time. *Priority of right in the use of water is not dependent upon there being a sufficient supply for all users. Upon the contrary, priority is of consequence only in times of actual or threatened deficiency of supply, and if it is not to be protected under such conditions, the right means nothing.*

"If priority of right is to be abandoned in the law of percolating water, in times of overdraft, it must be by legislative action. Even if that were done, vested rights of priority would have to be protected. Such vested rights of priority, as this appellant has, have been overridden by the judgment." [R. p. 738.]

The majority opinion of the state Supreme Court on the point [R. pp. 777-780] is no more than a rationalization of a conclusion reached without regard to pre-existing law. (Brief in Support of Petition, pp. 73-81.)

Respondents assert that "two uses made simultaneously from a basin are necessarily inconsistent and antagonistic," citing *Miller & Lux v. Enterprise Canal, etc. Co., supra.*[3]

Miller & Lux v. Enterprise, supra, supports no such theory. The Enterprise Canal Company had erected a diversion dam in the San Joaquin River immediately below a slough on which Miller & Lux originally had riparian rights. The water backed up by the dam was to a large extent stored in plaintiff's slough, and the whole stream, including the stored water, was diverted by defendant

---

[3]From this it would seem to follow that there could not be two non-conflicting users of water out of the Raymond Basin and, therefore, any use of Raymond Basin water made openly, notoriously, and under claim of right as against all other owners and producers, is an adverse use and forms the basis of a prescriptive right, particularly if there is an insufficiency of water for both, or all, users. Nothing could be more absurd. To establish a prescriptive right by adverse use, there must be a rightful owner and a wrongful trespasser. Only the wrongdoer, by his trespass, establishes a prescriptive right; not by taking public water or other property subject to appropriation, but by misappropriating privately owned water, or other property. Thus, both the rightful owner and the wrongdoer must each be identified. As long as one is taking water to which he has a priority right, he is not a wrongdoer and can acquire no title thereto by prescription. The wrongful nature of the act is not presumed but must be proved. Where the operator has a right, his development of water is necessarily under that right and not wrongful. Thus the establishment of the priorities is unavoidable, in order to determine in case of overdraft, who was the wrongdoer in creating the overdraft and whose water he misappropriated. If and when there was an overdraft, the rightful owners of priorities may have kept within their rights and priorities at all times. The wrongdoer either took the priority water of some particular legal owner, who can and must be identified, or he took water indiscriminately and thus only from him who had the most recent priority and thus the weakest right. It is a mere dodging of the issue to assume, without proof, that all the operators were wrongdoers, each equally guilty of creating the overdraft; that all the original owners lost their legal rights proportionately and that all acquired prescriptive rights, regardless of the dates of acquisition, in the ratio that their most recent diversions by pumpage or surface diversions (ignoring for the moment the fact that the surface diversions were not reduced) bore to the total of all diversions.

through a canal to various communities below, where for more than twenty-five years it had been dedicated to public service, *all of it*, with the knowledge and acquiescense of the plaintiff, and thus placed beyond recall from such service and use in any part by plaintiff. The original diversion was without any grant of right from plaintiff, but because plaintiff had so acquiesced in its dedication to public service, it was held estopped to reclaim and use any of the water. Defendant's use of the water was unquestionably inconsistent with and antagonistic to any use of the water by plaintiff. There was no claim of right by prescription. As here, various essentials of a prescriptive right were not present. The Court simply held that plaintiff's private right must give way to the public interest, that plaintiff from and after the time of dedication could neither use the water nor enjoin its use by defendant, but was relegated to a claim for damages.

In an attempt to bolster up their position, respondents refer to a stipulation, in which petitioner joined, "that the taking of water by each party was under a claim of right," and say that the stipulation "sufficiently disposes of petitioner's contentions and fully justifies the conclusion of the court as set forth in its opinion." (Their brief p. 26.)

Neither the state Supreme Court nor the District Court of Appeal took any such view of the stipulation.

In its opinion the state Supreme Court said:

> "We must look, therefore, to see if the disputed elements for a prescriptive right are shown by the record. Most of the factors are covered by the stipulation in which all the parties, including appellant, joined, namely, that 'all of the water taken by each of the parties to this stipulation and agreement

was, at the time it was taken, taken openly, notoriously, and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein.' *Two necessary elements are omitted: The length of the period over which the adverse user continued and the nature and extent of actual adverse user, if any.*" [R. p. 777.]

The state Supreme Court then proceeded to hold (1) that the overdraft itself constituted an invasion, and therefore adverse user; and (2) that the lowering of the water table in petitioner's wells gave constructive notice. [R. pp. 777-779.]

See, also, opinion of Court referring to stipulation, and holding that overdraft did not constitute adverse user. [R. pp. 713-716.]

We have shown in our Brief in Support of the Petition that the decision of the state Supreme Court in the above respects is contrary to theretofore existing law (pp. 74-85); and, as we have shown above, respondents have not met our argument in that behalf.

Respondents devote much space to undertaking to argue the irrelevant proposition that "questions of state or general law are not federal questions" (their brief pp. 18-23), but pass in silence *Shelley v. Kraemer* (1948), 334 U. S. 1; *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U. S. 673, and other authorities (Brief in Support of Petition, pp. 70-72) holding that action which the due process clause forbids legislatures to take, it forbids courts to adopt, particularly where such action deprives a person of property without his day in court (p. 71).

Conclusion.

In our Brief in Support of the Petition we state:

> "The cases believed particularly to sustain the jurisdiction are: *Morgan v. United States* (1936), 298 U. S. 468; *Morgan v. United States* (1938), 304 U. S. 1; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937), 301 U. S. 292; *Carter v. Kubler* (1943), 320 U. S. 243; *Shelley v. Kraemer* (1948), 334 U. S. 1; and *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U. S. 673." (P. 41.)

The specific application of those cases here is definitely shown in our brief. (See "Table of Authorities Cited.")

Respondents pass over without comment the two cases last cited.

Except for a few half-hearted references to the first three cases (Resp. Br. pp. 12-15), respondents made no effort to deal with them, except by citing and quoting from *Pacific Live Stock Co. v. Lewis* (1916), 241 U. S. 440.

Manifestly, even though the *Pacific Live Stock* case were in point here (and we have shown that it is not) it would have to yield to the authority of the two *Morgan* cases, the *Ohio Bell Telephone* case, and *Carter v. Kubler.*

It is submitted that the Writ of Certiorari should issue as prayed.

Respectfully submitted,

JOSEPH L. LEWINSON,

RICHARD C. GOODSPEED,

Attorneys for Petitioner.